Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

DENNIS COCHRAN, Individually and in his Capacity as the Chief of Police of the City of Edmond, Oklahoma,

Petitioner,

v.

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES, and JAMES DALLAS TELL, III,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Supremacy Clause, a state appellate court may materially alter the qualified immunity defense, narrowing the scope of its protection by applying the label of "clearly established" to a property right enunciated for the first time in the proceedings under review and made retroactive to the time of the officer's action.

2. Whether this Court's repeated references to the "contours of the right" involved in qualified immunity analysis refer exclusively to the officer's actions, or to the proprietary interest itself when that interest arose out of novel circumstances.

3. Whether a state appellate court can modify the qualified immunity defense for use in cases arising under federal law but brought in a state court.

4. Whether, as a matter of law, a local official's actions can be deemed other than "objectively reasonable," in the absence of "on-point" authority, when he acts consistently with analogous authority, and both the trial judge and three dissenting justices of an appellate court recognize the legitimacy of his actions at the time he acted.

5. Whether the Oklahoma Supreme Court misapplied the holdings of this Court by converting the issue of qualified immunity to a jury question. In this context, and as more fully set forth below, resolution of this issue would allow this Court to heal a split among the circuits on this issue.

6. Whether the Oklahoma Supreme Court misapplied the holdings of this Court by effectively shifting the burden to the defendant (Petitioner herein) to justify application of the qualified immunity defense as opposed to requiring the plaintiffs (Respondents herein) to negate it.

7. Whether cursory appellate rejection of legal authority justifying the qualified immunity defense articulates an adequate foundation for subjecting Petitioner to trial.

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Appendix B — Order Of The District Court Of Oklahoma County, State Of Oklahoma Dated And Filed January 17, 2002 ..... 43a

Dennis Cochran, individually and as Chief of Police of the City of Edmond, Oklahoma, respectfully requests this Court to issue a Writ of Certiorari to correct errors of Constitutional law and prevent misapplication of federal law principles by the courts of that State in derogation of his federally established rights. Specifically, the Supreme Court of Oklahoma has laid down a new rule of law which it has made applicable to Petitioner retroactively so that litigation initiated against him under 42 U.S.C. § 1983 may proceed in the face of an otherwise valid immunity defense. Further, the Oklahoma Supreme Court has determined that a jury, rather than the Court, may decide upon the reasonableness of a government official's conduct under existing law as a matter of fact upon instruction. In so doing, the Oklahoma Supreme Court has eviscerated the "qualified immunity" defense to the extent that it runs contrary to this Court's declared goal of precluding a government official from standing trial in cases where the defense applies.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court (App. A at 1a-__a) is published at 2003 OK 42, __ P.3d __. The judgment of the trial court (which does not contain an exhaustive opinion) is unpublished. (App. B at __a-__a).

STATEMENT OF JURISDICTION

The judgment of the Oklahoma Supreme Court was entered on April 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, which provides in part:

> . . . nor shall any state deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment, which provides in part:

> No person shall . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Supremacy Clause, which provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity. . . .

STATEMENT OF THE CASE

1. At all material times, Dennis Cochran, held the office of Chief of Police in the City of Edmond, Oklahoma, and acted in the course and scope of that office as Chief of Police for the City of Edmond.

2. The individual respondents and others applied to become eligible for the rank of sergeant, a rank filled by competitive testing.

3. Pursuant to the Collective Bargaining Agreement (hereinafter "CBA") between the City of Edmond and the Fraternal Order of Police Lodge No. 136, applicants first took a written exam and the top candidates from the exam participated in an "Assessment Center". Assessment Centers are conducted by officers from police departments other than the City of Edmond.

4. Respondents and other officers qualified for, and participated in, such an Assessment Center in July of 1998.

5. At the beginning of the Assessment Center, Cochran addressed the assessors to thank them for their participation. On the last day of the Assessment Center, Cochran took the assessors to lunch to again thank them for their participation.

6. Following an Assessment Center, the applicants are ranked and for the next year the Chief may fill in an available position from the top three remaining candidates on the promotional list.

7. While the list from the Assessment Center was in effect, Cochran personally chose each of the Respondents to fill available sergeant positions.

8. Another officer, Dennis Dill (hereinafter "Dill"), who also participated in the same Assessment Center but was ranked last, filed a grievance pursuant to the aforementioned "CBA" claiming various improprieties with the process, including, *inter alia*, that Chief Cochran had contact with the assessors.

9. Chief Cochran permitted Respondents to continue serving in their positions as sergeants during the course of the arbitration process. In doing so, he aroused the ire of the local FOP Lodge. The FOP maintained that the "CBA" did not allow for what it called "temporary sergeants." Chief Cochran championed the Respondents' cause, causing the FOP to file a grievance against them. Chief Cochran resisted this challenge to the Respondents' position, maintaining all along that "the right men were selected the first time." He successfully staved

off the FOP's efforts to force him to immediately reduce Respondents in rank. By his efforts, they kept their posts until the new Assessment Center was conducted.

10. The "new Assessment Center" became necessary pursuant to the CBA, since, when Dill's grievance ran its course, the arbitration panel ordered that another Assessment Center be conducted, ruling that the promotional list from the original Assessment Center was null and void.

11. Respondents did not successfully place, as a result of the second Assessment Center, and three other applicants gained those offices. To date, however, all but Respondent Teel have successfully regained that post.

12. Chief Cochran understood that the voiding of the original promotion list, not any action or infraction of the Respondents, mandated the second round of testing. As such, he never believed the Respondents "demoted" as that term is used in the "CBA" and the policies of the Edmond Police Department.

13. Neither Cochran nor the City of Edmond appealed the arbitrator's nullification of the original Assessment Center. The Oklahoma Supreme Court has repeatedly made clear its position that, since "[t]he fundamental purpose of arbitration is to preclude court intervention into the merits of disputes when arbitration has been provided for contractually." Therefore:

> Courts generally favor arbitration statutes and collective bargaining agreements because they provide substantial justice by an immediate and speedy resolution with a minimum of court interference. The function of the court is generally limited to ascertaining whether the party is making a claim which is governed by the contract when the parties have agreed to submit all questions of contract interpretation to an arbitrator. The Steelworkers Trilogy decisions simultaneously

> determined by the United States Supreme Court held that courts are limited to determining whether: 1) there is a collective bargaining agreement in existence; 2) there is an arbitration clause; and 3) if there is an allegation that a provision of the agreement has been violated. If the arbitration clause is broad enough to include the alleged dispute, arbitration must be ordered. If the arbitrator stays within the submission and makes an award within the authority established by the contract, the award must be enforced.

Voss v. City of Oklahoma City, 1980 OK 148, Pars. 5-6, 618 P.2d 925. Additionally, in *Taylor v. Johnson*, 1985 OK 69, Pars. 5-7, 706 P.2d 896, the Oklahoma Supreme Court took the City of Oklahoma City, to task thusly:

> By attempting to have the District Court of Oklahoma County decide the question of whether the collective bargaining agreement between the City and F.O.P., Lodge 123, requires that the City be bound by the arbitrator's decision in this case, the City is circumventing this Court's pronouncement in *Midwest City v. Harris*, 561 P.2d 1357 (Okla. 1977), as to the import of 11 O.S. 1981 §§ 51-111. In *Harris* at page 1358, 1359, we stated that:
>
> > Particular language used in §§ 548.12 expresses the clear legislative intent for any disputes arising from the interpretation or application of the binding agreement to have an "immediate and speedy resolution" by required mediation. . . .
> >
> > It is the procedures, not the substantive law, of §§§§ 548.8, .9, .10, and .11 that is used by §§ 548.12. That section does not adopt that portion of §§ 548.9 which does not require

> the City to adopt the opinion of the arbitrators. That option relates only to the adoption of the original collective bargaining agreement. Section 548.12 provides "the arbitration board's determination shall be final" . . . (Footnote omitted)

Finally:

> Judicial review of a valid arbitration agreement is limited to a determination of whether the grievance alleged is covered by the agreement or to determine if the arbitrator acted within the authority granted by the agreement. If the arbitration clause is broad enough to include the alleged dispute, arbitration must be ordered. If the arbitrator's award is within the submission and authority established by the contract, the award will be enforced. The courts will not vary an arbitration award which is contested on the merits of the controversy submitted to the arbitrator or on the sufficiency of the evidence on which the arbitrator based its decision.

City of Bethany v. Public Employees Relations Board, 1995 OK 99 n.33, 904 P.2d 604. Oklahoma's extant jurisprudence informed the decision of both Chief Cochran and the City to forego judicial challenge to the arbitration decision.

14. As much as it galled him to redo the Assessment Center, Chief Cochran's own experience with the judicial response to arbitration also informed his actions. In a case called *Neal v. City of Edmond*, _ OK CIV APP_, __ P.2d __, (Docket Number 93, 932 2000), Chief Cochran dismissed an Edmond patrolman after the last of a series of alcohol-related driving infractions, with accident, resulted in criminal charges and the loss of the offending officer's driver's license. An arbitration panel, in a 2-1 vote, reinstated the officer. The City challenged the decision in court, which resulted in a summary judgment awarded to the

officer. The City next appealed, and Oklahoma's Court of Civil Appeals ruled, *inter alia*:

> Mandatory grievance arbitration for public safety workers and municipal employers, under 11 O.S. 51-111 of the Act, does not violate the Oklahoma Constitution. See City of Bethany v. Public Employees Relations Bd. Of State of Oklahoma, 1995 OK 99, 904 P.2d 604. Arbitrators have no obligation to the courts to give their reasons for an award. City of Yukon v. International Ass'n of Firefighters, Local 2055, 1990 OK 48, 792 P.2d 1176, 1180. The appellate court's standard of review of an arbitration panel's award is limited to the determination of: (1) whether there is a CBA; (2) whether the dispute falls within the arbitration clause of the CBA; and (3) whether the arbitrator exceeded his/her authority under the CBA. See City of Yukon, supra; Voss v. City of Oklahoma City, 1980 OK 148, 618 P.2d 925. The courts may not review the correctness of the arbitration decision. As noted by the City of Yukon City, this standard of review, adopted in Voss v. City of Oklahoma City, supra, is the standard of review set forth in the Steelworkers Trilogy:
>
> Once it is established that there is a collective bargaining agreement with an arbitration clause broad enough to include the dispute the role of this Court is strictly limited to determining whether the arbitrator exceeded his authority under the collective bargaining agreement. . . . Affording great deference to the decision of the arbitrator, we will not review the factual or legal findings of the arbitrator nor consider the merits of the award. . . . "*The fundamental purpose of arbitration is to preclude court intervention into the merits of disputes when*

> *arbitration has been provided for contractually.*" *Voss v. City of Oklahoma City, 618 P.2d at 927.* Hence, this Court may only consider whether the arbitrator's decision "draws its essence from the collective bargaining agreement." . . . .

Emphasis supplied. The Court of Civil Appeals reached that decision not withstanding uncontroverted evidence that the presiding member of the arbitration panel had been stopped by an Edmond police officer for an infraction on his way out of town. He told the Officer that he had just presided over Adrian Neal's arbitration and asked the patrolman if he knew Neal. The officer then declined to write up a ticket and, in fact, gave the arbitrator an escort back to his hotel and assisted him in finding the best route to the airport. The Court of Civil Appeals did not feel this called the presiding arbitrator's neutrality into question.

The Oklahoma Supreme Court denied certiorari. This experience simply reinforced the commonly held notion in the City of Edmond that appeal of Dill's grievance would prove foolhardy.

15. Upon the failure of the Respondents to successfully test, they filed a lawsuit in the District Court of Oklahoma County alleging, *inter alia*, that Chief Cochran denied them their property interest in their Sergeant status without due process since they had committed no disciplinary infraction subjecting them to "demotion." They sought compensatory and punitive damages against Chief Cochran individually for their loss of pay and status, all under the auspices of 42 U.S.C. § 1983.

16. Chief Cochran timely raised the defense of "qualified immunity."

17. The trial court did not dismiss on the pleadings. At the close of discovery, all parties moved for summary judgment. The trial court granted summary judgment to both Cochran and the City of Edmond.

18. Respondents appealed to the Oklahoma Supreme Court and requested that the state supreme court, rather than an intermediate appellate court, retain the case for disposition. The Oklahoma Supreme Court retained the case. Upon *de novo* review of the materials submitted to the trial court both for and against summary judgment, the court ruled, in a 6-3 judgment as to Cochran's issues, that the trial court be reversed. In doing so, the majority held that the property interest in a position subject to invalidation by virtue of a pending arbitration had been clearly established. Specifically:

> ¶¶ 22 Cochran contends that even if Appellants had had some constitutionally protected property interest for which due process would attach, it was not so "clearly established such that reasonable officials would have understood that their conduct violated that right", citing *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998). He contends that the clearly established law required him to accept and follow the Arbitrator's ruling, whether or not he agreed with it, citing the Court of Civil Appeals' June 16, 2000, unpublished opinion in *F.O.P. and Neal v. City of Edmond*, in case number 93,932. However, reliance on *Neal* for guidance in this case was misplaced. *Neal* involved the City's refusal to enforce an arbitration award arising out of a grievance filed by the officer involved, Neal. Here, however, we are concerned with whether Cochran's conduct of demoting Appellants was required to enforce the arbitration award arising from Dill's grievance. He also contends Appellants' promotions became a nullity as a matter of law and that the established law gave Appellants no more than a protected interest in continued employment, not in a particular job or rank.

¶¶ 24 In Cochran's motion on this issue, he contends that ***if*** Appellants had a property interest in their positions as sergeants, he did not deny them due process. Rather, he contends it was the F.O.P., the CBA's procedures and the Arbitrator which were responsible for denying them any such alleged right. However, the arbitrator's function is to enforce the CBA, not to protect the constitutional rights of the grievant. See McDonald v. City of West Branch, 466 U.S. 284, 290-291, 104 S.Ct. 1799, 1803, 80 L.Ed.2d 302, which held "because an arbitrator's authority derives solely from the contract, . . . an arbitrator may not have the authority to enforce §§ 1983 . . . Indeed, when the rights guaranteed by §§ 1983 conflict with provisions of the collective bargaining agreement, the arbitrator must enforce the agreement." [Citations omitted]. Moreover, Appellants were not grievants whose case was before the Arbitrator. Cochran also asserts Appellants can not have a constitutionally protected property interest in a position they are legally considered to have never held.

¶¶ 25 Appellants sustained their burden of naming the clearly established right, a property interest in their employment ***and rank***, through the clearly established federal law at the time, i.e., the Tenth Circuit Court of Appeals' cases, *Hennigh* and *Dill*. While they are not Oklahoma Supreme Court cases, both cases interpret Oklahoma law and were published opinions at the time of the demotions. *Dill* was certainly known to the City of Edmond and Chief of Police Cochran. It dealt with a CBA virtually identical to the one at issue herein. Moreover, the FPAA, with which the City and Cochran were familiar, requires them to follow the terms of the CBA. Cochran responds with the claim that he had

> no choice except to follow the Arbitrator's ruling. This position raises material factual issues: did Cochran have to demote Appellants in order to comply with the arbitration award, thereby depriving them of their property interest and due process rights, or was there an alternative method of compliance which also complied with the law and the CBA? Did Cochran disregard the clearly established law at the time? In other words, would reasonable minds differ, or are different inferences possible, as to how to implement the ruling? We determine different inferences are possible, and summary judgment was improperly granted on this issue.

In so holding the Oklahoma Supreme Court threw out the import of its own prior decisions and Cochran's own experience as pertains to arbitration; used two vastly distinct Tenth Circuit cases, neither of which dealt with an arbitration scenario, to support its position Oklahoma law was "clearly established"; and left to the jury the question of whether Cochran had legal alternatives to re-administering the test.

19. The significance of the cursory and unprecedented treatment of these issues did not escape notice of the dissenting justices. Mr. Justice Winchester wrote:

> ¶¶ 2 Cochran is entitled to qualified immunity under *Butz v. Economou*, 483 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895. Cochran contends that the clearly established law required him to accept and follow the arbitrator's ruling, whether or not he agreed with it. This ruling provided that appellants were to be demoted. Cochran relied upon *F.O.P. and Neal v. City of Edmond*, case number 93,932, an unpublished opinion of June 16, 2000, by the Court of Civil Appeals, in his belief that clearly established law required him to accept and follow the arbitrator's ruling.

¶¶ 3 The majority opinion states that Cochran's reliance on *Neal* "was misplaced." This finding is immaterial, given that Cochran's reliance on *Neal* was reasonable. I would adopt the rationale espoused by the United States District Court for the Western District of Oklahoma in *Terrapin Leasing, Ltd. v. United States*, 449 F. Supp. 7 (W.D.Okla. 1978). That court, in addressing the issue of qualified immunity as applied to federal officers, which has been held identical to the immunity doctrine applied in 42 U.S.C. §§ 1983 actions to immunity of state officials[fn1], stated: "... the issue is not the officers' attitude generally but whether they believed they were acting in accordance with the law. ..."

* * * *

¶¶ 5 In the instant matter, I would hold that Cochran's reliance upon the *Neal* case for guidance, even if misplaced, constitutes convincing evidence that he reasonably believed he was acting in accordance with the law, thereby entitling him to qualified immunity from liability under §§ 1983. As the United States Supreme Court stated in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, quoting from *Scheuer v. Rhodes*, 416 U.S. at 247-248, 94 S.Ct. at 1692:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity. ...

Going further, Justices Summers and Boudreau held:

> ¶¶ 12 The opinion of the Court concludes that Plaintiffs met their burden of showing a clearly established right in that they possessed a property interest in their rank. The opinion fails to address

the pivotal issue underlying both Plaintiffs' claim and Cochran's defense of immunity — the authority of the arbitrator and Edmond's duty to follow the arbitrator's ruling. Simply, the Court focuses on a "right" without considering the corresponding "duty" of Cochran.

¶¶ 16 In this case, there were competing, conflicting, and unclear legal forces operating upon the chief when he made his decision to return Plaintiffs to their former rank. On one hand, section 7.1(F) of the collective bargaining agreement provided that a permanent employee may be demoted only for cause, subject to the "disciplinary grievance procedures . . . if such action falls within the definition of grievance." On the other hand, until today, the law was unclear as to whether the arbitrator's ruling constituted cause for returning Plaintiffs to their former rank. Further, Cochran's decision concerning Plaintiffs had nothing to do with "discipline." And finally, Cochran's reluctance not to follow the arbitrator's ruling was objectively reasonable since, in a very recent case, he had chosen not to follow the ruling of an arbitrator, only to be told by the trial court (subsequently affirmed by the Court of Civil Appeals) that he had to follow the arbitrator's ruling whether it was right or not. *Neal v. City of Edmond*, No. 83,932, (Okla.Civ.App. June 16, 2000), *cert. denied*, October 17, 2000.

¶¶ 18 This Court has adopted the concept from federal law that an arbitrator's ruling should be followed whether right or not. *City of Yukon, supra. The Court now, for the first time, puts officials on notice that they may not in good faith rely upon an arbitrator's ruling, even though the parties have previously made that ruling contractually binding.*

Emphasis Supplied.

REASONS FOR GRANTING THE PETITION

PROPOSITION I:

DENIAL OF QUALIFIED IMMUNITY CONSTITUTES AN IMMEDIATELY APPEALABLE DECISION.

In stripping him of the protection of qualified immunity as designed and implemented by this Court, the Oklahoma Supreme Court rendered an immediately appealable decision. In *Behrens v. Pelletier*, 599 U.S. 299, 306 (1996), this Court left no doubt as to the placement of qualified immunity in that:

> 'small class' of district court decisions that, though short of final judgment, are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'

In fact, it went so far as to note that multiple appeals on this issue may arise in the course of a single litigation.

The decision, as handed down by the Oklahoma Supreme Court, presents this Court with a pure question of law. Although the State's high court remanded for fact findings relative to the immunity question, it did so on matters not central to this Court's determination of the ultimate questions presented for review.

An order is purely legal where it concerns only the application of established legal principles to a given set of facts. *See Johnson v. Jones*, 515 U.S. 304, 313-14 (1995). An order is not "legal" where it resolves a fact-related dispute of "evidence sufficiency." *Id.* Here, the legal principle is the objective reasonableness of an official's conduct under clearly-established law, the qualified immunity doctrine. The collateral order doctrine permits an interlocutory appeal in circumstances such

as these, even though this Court would not normally hear, nor would Petitioner attempt, an appeal from a denial of summary judgment. *See Wren v. Towe*, 130 F.3d 1154, 1157 (5th Cir. 1997).

Even the existence of disputed issues of material fact does not preclude review where the district court's actions were based in law. *See Bass v. Richards*, 308 F.3d 1081 (10th Cir. 2002) (where the issue is whether a *"given set of facts"* establishes or negates qualified immunity, the order is appealable); *Hare v. City of Corinth*, 135 F.3d 320, 324 (5th Cir. 1998); *Christophel v. Kukilinsky*, 63 F.3d 479, 485 (6th Cir. 1995). Indeed, "*Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for the purposes of summary judgment met the *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] standard of objective legal reasonableness." *Wren*, 130 F.3d at 1157 (*quoting Behrens, supra.*)

With the operative facts clear, no jurisdictional impediments hinder this Court's disposition of the merits of this Petition should it grant certiorari. For the reasons set forth below, Chief Cochran prays that it do so.

PROPOSITION II:

THE EXISTENCE OF THE QUALIFIED IMMUNITY DEFENSE CONSTITUTES A MATTER OF FEDERAL LAW, DETERMINED IN ACCORDANCE WITH FEDERAL STANDARDS.

Chief Cochran is entitled to qualified immunity because he was legally obligated to follow the dictates of the arbitration award. And in doing so, Chief Cochran cannot be said to have knowingly violated any clearly established right since on appeal below a property interest in a *rank* was first recognized where the rank was derived from a promotional list which had been determined to be void by the arbitrator.

The Oklahoma Supreme Court's misapplication of this Court's immunity decisions strikes at the very heart of federalism. As this Court held in *Howlett v.. Rose*, 496 U.S. 356 (1990):

> 'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §§ 1983 or §§ 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin* v. *Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968). *The immunity claim raises a question of federal law.*'

496 U.S. at 376-77. (Emphasis added). *Howlett*, in turn, springs from this Court's unanimous opinion in *Martinez v. California*, 444 U.S. 277 (1980) which held that federal law applies even when the Section 1983 claim is brought in a state court. With that principle fixed in mind, *Howlett* goes on to explain:

> The elements of, and the defenses to, a federal cause of action are defined by federal law. See, *e.g.*, *Monessen Southwestern R. Co.* v. *Morgan*, Page 486 U.S. 330, 335 (1988); *Chesapeake & Ohio R. Co.* v. *Kuhn*, 284 U.S. 44, 46-47 (1931). A State may not, by statute or common law, create a cause of action under §§ 1983 against an entity whom Congress has not subjected to liability. *Moor* v. *County of Alameda*, 411 U.S. 693, 698-710 (1973). Since this Court has construed the word "person" in §§ 1983 to exclude States, neither a federal court nor a state court may entertain a §§ 1983 action against such a defendant.

It is here that the fabric of the Oklahoma Supreme Court's ruling begins to unravel, particularly in a Constitutional sense.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court encapsulated the doctrine of qualified immunity's evolution to that point, stating that its prior decisions had:

> provid[ed] government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, *e.g.*, *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *id.*, at 344-345 (police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application); *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they took); *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984); *id.*, at 198 (BRENNAN, J., concurring in part and dissenting in part); *Harlow* v. *Fitzgerald*, *supra*, at 819. Cf., *e.g.*, *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978). Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally *turns on the "objective legal reasonableness"* of the action, *Harlow*, 457 U.S., at 819, *assessed in light of the legal rules that were "clearly established" at the time it was taken*, *id.*, at 818.

483 U.S. at 638-39 (emphasis supplied). As he wrote this for the majority, Petitioner submits that Mr. Justice Scalia set the stage for his later exposition on the heart of the qualified immunity doctrine. Grounded in "objective reasonableness" assessed as of the occurrence of the complained of acts, this Court, with crystal clarity, informed the decision of all other

tribunals in the land by prohibiting a judicial *ex post facto*, if you will, from moving the finish line on a hapless public official by creating legal rules *nunc pro tunc* as a basis for liability.

Given this Court's development of "qualified immunity" jurisprudence, it should come as no novel theory that precedent and not precognition determine the "clearly established" nature of a property right. Circuit Courts of Appeal have repeatedly held that later decisions do not establish a basis for finding the law "clearly established." In fact Oklahoma's own Tenth Circuit has held:

> Although the parties devote large portions of their briefs to a discussion of cases decided after the events at issue took place, in determining whether defendant violated plaintiff's clearly established rights, we may consider only those decisions decided prior to the allegedly unlawful arrest of plaintiff. " 'A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established *at the time of the conduct at issue.*' " *Lutz v. Weld County School Dist. No. 6*, 784 F.2d 340, 343 (10th Cir. 1986) (quoting *Davis v. Scherer*, 468 U.S. 183, 197, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1983) (emphasis added)).

Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990). *See also Horwitz v. Board of Medical Examiners*, 822 F.2d 1507 (10th Cir. 1987)

> The district court observed that the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), relied on by Dr. Horwitz, was decided after the Board suspended his license and thus could not have been the basis for any clearly established constitutional

> rights of Dr. Horwitz which were offended by the Board's suspension. We agree.

Other circuits share this view. *DiMartini v. Ferrin*, 906 F.2d 465, 467 n.3 (9th Cir. 1990) ("court must look to the legal lanscape [*sic*] at the time of the incident to determine whether a right is clearly established"); *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989) ("*Williams* was decided after the alleged violations in this case. Therefore, *Williams* is not helpful in determining whether a clearly established right existed in 1985."); *Sinclair v. Schriber*, 916 F.2d 1190 (6th Cir. 1990)

> the defendants would probably be entitled to qualified immunity because it was not clearly established law at the time of the WPP wiretaps that such surveillance was prohibited by the Sixth Amendment. The law regarding the constitutionality of warrantless domestic security wiretaps under the Fourth Amendment was not clearly established until the Supreme Court's decision in *Keith*, 407 U.S. 297, 92 S. Ct. 2125, which was decided after the wiretap of the WPP

Hinnen v. Kelly, 992 F.2d 140 (7th Cir. 1993) ("But since *White* was decided after the search, Kelly was immune from liability for violating plaintiffs' constitutional rights because they were not clearly established at the time of the search."); *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994) ("None of Hansen's citations of authority show that defendants violated clearly established law. *Broderick v. Roache*, 996 F.2d 1294 (1st Cir. 1993), was decided after the events underlying this case and, thus, was not pre-existing law").

If the Supreme Court of Oklahoma correctly "clearly established" a right in this case, then tossed Chief Cochran into the pit of forensic combat for action he took years earlier, then both the Tenth and her sister Circuits are wrong. Because, as explained in *Wilson v. Layne*, 526 U.S. 603 (1999), the term "clearly established" has a precise meaning in the qualified

immunity context. *Id.* at 614-15, the Oklahoma Supreme Court's decision bucks not only that position taken by the Circuits; it contravenes *Creighton* as well:

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: *The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see Mitchell, supra, at 535, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.*

483 U.S. at 641 (emphasis added). *Harlow*'s reasonableness standard is ultimately a protection from liability due to the retroactive application of new legal standards or unanticipated applications of existing general standards. "The purpose of the doctrine of official immunity is to protect officials from legal surprises." *Nelson v. Streeter*, 16 F.3d 145, 151 (7th Cir. 1994) (Posner, J.). The *Harlow* standard "gives ample room for mistaken judgments," protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). The defense thus gives officials a margin of error around all but clearly defined rights, a necessity in an increasingly complex legal environment. *Cf. Anderson, supra*, 483 U.S. at 644 (qualified immunity necessary to protect officers making often difficult Fourth Amendment decisions).

> These officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.' See P. Schuck, *Suing Government* 66 (1983). In these circumstances, officials should not err always on the side of caution. '[O]fficials with a broad range of duties and authority

> must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.'

Davis v. Scherer, 468 U.S. 183, 196 (1984) (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974)).

1. The Oklahoma Supreme Court's Reliance on Hennigh

The Oklahoma Supreme Court cited *Hennigh v. City of Shawnee*, 155 F.3d 1249 (10th Cir. 1998) for its conclusion the law in this case "was clearly established." In that case, the plaintiff received a reduction in rank based upon allegations of sexual harassment. The Review Board refused to hear evidence on the charges and dismissed them on procedural grounds. The City Manager imposed the discipline following an interview with the complaining officers and an opportunity for plaintiff and his attorney to respond to the charges. Hennigh complained that he had a property interest in the rank of lieutenant, and that the City denied him due process in his demotion. The trial court granted summary judgment for defendants upon her finding of both no property interest and the shield of qualified immunity.

The Oklahoma Supreme Court uses *Hennigh* as a basis for stating that Chief Cochran violated clearly established rights. In fact, *Hennigh* represented a pure discipline case. Based upon that holding as published, Hennigh lost his rank for no other reason than the charges of sexual inappropriateness. In that "for cause" case, the City bore the burden of finding cause before disciplinary action. *Hennigh* does not address the issue of actual or apparent voidness of a rank based upon arbitral condemnation of the procedures through which that rank was obtained. In addition, the Tenth Circuit approved the informality with which the City determined Hennigh's penalty. Specifically, the court held "that the hearing before the Review Board and the other opportunities provided to this Plaintiff, at which he was allowed to participate and was represented by counsel, met the constitutional standard for a pre-termination hearing."

Based upon *Hennigh*, one cannot say that the retesting of officers after the first test proved nugatory constituted a violation of a "clearly established right." Further, Respondents had every opportunity to defend their rights in grievances of their own but failed to make full use of the procedures available. They did not grieve the original decision to re-administer the test. They grieved only after they realized they performed poorly on the test. The FOP denied that grievance.

Hennigh held that "the Constitution does not require that each individual receive the procedural guarantees provided for by the instrument which bestows a property interest." *Id.* (*citing Hicks v. City of Watonga*, 942 F.2d 737, 746 & n.4 (10th Cir. 1991)). "The Due Process Clause of the United States Constitution entitles each citizen to notice and an opportunity to be heard prior to the deprivation of a fundamental right." *Id.* (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (A "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.")). As per *Hennigh*, grievance procedures established by collective bargaining agreements generally satisfy an employee's right to post-termination due process. 155 F.3d at 1256. Respondents could have used the grievance process and/or excelled on the test to secure their ranks. They did not fully utilize the one and did not pass the other.

Nothing in *Hennigh* would have informed Chief Cochran that he acted unlawfully in his non-disciplinary and involuntary implementation of the arbitrator's order. Nothing in *Hennigh* establishes that the manner of that implementation violated the Constitution. Nothing in *Hennigh* diminishes his right to qualified immunity.

2. The Oklahoma Supreme Court's Reliance upon *Dill*

The Oklahoma Supreme Court also relied upon *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998) to support its assertion that Chief Cochran violated clearly established rights. In *Dill*, a detective claimed a retaliatory demotion occurred when the City moved him from detective to patrol division at a time when service in those areas constituted a matter of assignment rather than rank. Dill further alleged that he tried to grieve the matter to then Chief Vetter. Allegedly, a Major told Dill that he would face insubordination charges if he pursued that course. The Tenth Circuit affirmed the trial court's finding of fact that the reassignment carried a disciplinary aspect. It further affirmed the trial court's finding, again a matter of fact, that Dill could be excused from pursuing the grievance process based on its apparent futility.

Dill shares no common features with this case. *Dill* recognizes that "not all property interests deserve Constitutional protection." 155 F.3d at 1207. A reasonable administrator could decide that a right which cannot be taken away for cause entails some due process, one premised on an invalid promotion process would not. "The Due Process Clause is not a guarantee against incorrect or ill-advised decisions." *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992).

This Court should declare the absence of commonality fatal the Oklahoma Supreme Court's usage of *Dill* to vitiate Chief Cochran's right to qualified immunity.

3. This Court Should Grant Certiorari to Uphold the Policy Embodied In and Furthered By Qualified Immunity

Since qualified immunity derives from policy considerations established by this Court, the defense must be interpreted in light of these policies. The official's margin of error must be preserved by paying careful attention to the state of the law at the time of the act.

Long ago, in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), this Court held that the Supremacy Clause binds the Several States to follow its decisions upon matters concerning the laws of the United States. Specifically, Mr. Justice Story wrote, on behalf of this Court:

> There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights.

The Oklahoma Supreme Court did not follow the path mapped by this Court. Its cursory examination of the relevant law, if upheld, would force many government administrators into needlessly involved and expensive defenses against insubstantial claims. If the opinion gains ascendancy among the States as secondary or persuasive authority, it would lead to each State placing its own spin on the essential facets of the immunity doctrine so painstakingly crafted by this Court. In that manner, the opinion both on its own and as it may later find usage, dilutes both the protections and the predictability which qualified immunity law seeks to foster.

The Oklahoma Supreme Court's after enacted conclusion that Chief Cochran's alleged acts violated the Constitution, particularly in light of Oklahoma's extant arbitration jurisprudence, is the type of surprise this Court developed qualified immunity to prevent. We therefore ask that this Court grant certiorari to determine whether the Oklahoma Supreme Court misapplied the standards governing the "clearly established" prong of the immunity test.

PROPOSITION III:

THE OKLAHOMA SUPREME COURT VIOLATED FEDERAL LAW AND IMPERILLED THE DOCTRINE WHEN IT REMANDED IMMUNITY ISSUES FOR TRIAL BY JURY IN THIS CASE.

The reasonableness of Chief Cochran's reliance on his belief that he had no alternative in implementing the arbitrator's decision should be determined by the trial judge and not by a jury. The trial judge below found that Chief Cochran acted reasonably and therefore afforded him qualified immunity. The majority of the Oklahoma Supreme Court held that determination should be left to a jury. If a government official must wait for a jury determination before learning whether they are entitled to qualified immunity, officials will routinely find themselves participating in trials contrary to the purpose for qualified immunity.

As this Court well knows, the defense of qualified immunity completely protects government officials performing discretionary functions from suit in their individual capacities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 526 U.S. 730 (2002) (*quoting Harlow v. Fizgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who

is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal citation and quotation omitted).

Because qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation," *Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815, questions of qualified immunity must be resolved "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*). *Accord Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001) (calling qualified immunity "a question of law to be resolved at the earliest possible stage of litigation").[1]

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1. The Circuits are not in complete accord as to whether a judge or jury should make the ultimate immunity determination. Some, like the Tenth, have interpreted *Hunter* as requiring the judge to decide the ultimate immunity question. *See Swain v. Spinney*, 117 F.3d 1, 10 (1st Cir. 1997) (noting that "[t]he ultimate question of whether a reasonable police officer . . . could have believed his actions were in accord with constitutional rights is a question of law, subject to resolution by the judge [and] not the jury"); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996) (noting that "[q]ualified immunity is a legal issue to be decided by the court" and that "jury interrogatories [for disputed factual issues] should not even mention the term"); *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992) (stating that the issue of qualified immunity is "a question of law for the court, not a jury question").

Other circuits have endorsed an approach that permits a jury to evaluate the objective reasonableness of a defendant's conduct once the participation of a jury has already become necessary for the resolution of disputed factual issues. *See Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) (finding no error in instructions charging the jury to consider, in a qualified immunity case, whether the defendant's use of deadly force had been objectively reasonable); *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000) (stating that, if the qualified immunity issue is not decided until trial, it "goes to the jury which must then determine the objective reasonableness of the officers' conduct"); *Ortega v. O'Conner*, 146 F.3d 1149, 1156 (9th Cir. 1998) (finding that a district court's submission of the objective reasonableness question to the jury "constituted an appropriate and proper instruction"); *Oliveira v. Mayer*,

(Cont'd)

The reasons for this rule are well known: "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences." *Mitchell*, 472 U.S. at 525 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)) (internal citation omitted). Liability for money damages might make government officials overly timid in the performance of their duties. *Id.* at 525-26. Qualified immunity law seeks both to address this problem and to avoid costs such as "the expenses of litigation," the "diversion of official energy" and "the deterrence of able citizens from acceptance of public office." *Crawford-El v. Britton*, 523 U.S. 574, 590-91 & n.12 (1998).

The predictability facet of qualified immunity forms the core of the defense. Existing law must give defendants fair warning that they tread on Constitutionally hallowed ground. In *Anderson*, 483 U.S. at 639, this Court clarified that immunity may not be denied simply because "the relevant 'legal rule' " was "clearly established" at a high "level of generality." Thus, this Court explained, "it is not enough to show that the right to be free from unreasonable searches and seizures was clearly established," or that the applicable legal standard or formula had been settled by the courts. *Ibid.* To the contrary:

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear

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(Cont'd)

23 F.3d 642, 650 (2d Cir. 1994) (holding that a district court "should have let the jury . . . decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law. . . .").

Given the purposes of qualified immunity, the ends of justice and uniformity would be well-served by this Court's resolution of this disparity in this case.

> that *what he is doing* violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful * * * but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (emphasis added). The qualified immunity standard thus " 'gives ample room for mistaken judgments' " *Hunter*, 502 U.S. at 229.

Applied to this case, no one doubts the applicability of due process to deprivations of property. The issue here becomes whether the property interest identified by the Oklahoma Supreme Court in positions gained through an invalidated promotion process remain, or ever became property in the sense of fully vesting in the Respondents. The arbitration panel said, by a 2-1 margin, that the City must re-administer the test. Every decision flowing out of the Oklahoma Supreme Court warned public and private entities engaged in the decision-making process that they ignore an arbitrator's ruling at their peril and that, by design, arbitration decisions should remain outside the courts. In what one might consider an extreme case, Chief Cochran recently challenged the decision of an arbitration panel which reinstated an officer he terminated for multiple drunken driving convictions. He lost. He received from both the trial court and the intermediate appellate court boiler plate reminders of the sanctity of arbitration. The Oklahoma Supreme Court refused to grant certiorari. This disabused him of any notion that he had a choice in this matter.

The benefits of qualified immunity — protection from burdensome lawsuits and the distractions of protracted litigation — are effectively lost where an individual defendant is forced to go to trial or to engage in more discovery than necessary to establish the defense. *See Mitchell*, 472 U.S. at 526.

The defense of official immunity has strong historical roots. *See Owen v. City of Independence*, 445 U. S. 622, 638 (1980). Contemporary qualified immunity law is driven by policy considerations. In *Harlow*, this Court "completely reformulated qualified immunity along principles not at all embodied in the common law. . . ." *Creighton*, 483 U.S. at 645. "The transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits." *Wyatt v. Cole*, 504 U.S. 158, 170-171 (1992) (Kennedy, J., concurring); *see Crawford-El v. Britton*, 523 U. S. 574, 594 n.15 (1998).

Harlow replaced the malice-based subjective inquiry found at common law with its objective "legal reasonableness" test, *Creighton, supra*, 483 U.S. at 645, in order to further several policies. Most importantly, this Court sought to minimize the social costs of forcing public officials to defend against numerous damage actions. "As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow, supra*, 457 U.S. at 806. The threat of suits against innocent officials has many social costs. Therefore, *Harlow* deemed immunity a question of law for the judge to decide in the light of the "state of the law." 457 U.S. at 818-19.

Questions of law lie within the domain of the courts. For three hundred years, this Court has remained faithful to its declaration, originating in John Marshall's famous concurrence, that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *See also United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995) ("Of course, under Article III of the Constitution the courts are the final arbiters of the law . . ."). It requires reading with the judicial eye to ascertain the law which grounds a judgment. It requires analysis with judicial perspicacity to conclude the state of the law "clearly established."

Qualified immunity should remain, preeminently, a matter for the court. It is in essence a legal decision whether, on the basis of the law as it existed at the time of the particular incident, the lawfulness of the officer's conduct was reasonably clear or was a matter of doubt. Juries are hardly suited to make decisions that require an analysis of legal concepts and an understanding of the inevitable variability in the application of highly generalized legal principles. Moreover, such an analysis would seem to invite each jury to speculate on the predictability of its own verdict. For the sake of the survival of the doctrine, this Court should review the manner in which the Oklahoma Supreme Court disposed (or failed to dispose of) the issue of qualified immunity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DATED AND FILED APRIL 22, 2003

2003 OK 42

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 97,350

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES and JAMES DALLAS TEEL, II,

Plaintiffs/Appellants,

vs.

CITY OF EDMOND, a municipal corporation and DENNIS COCHRAN, individually and in his capacity as the Chief of Police of the City of Edmond,

Defendants/Appellees.

OPINION

WATT, Vice Chief Justice:

The dispositive questions in this appeal are: (1) Did Appellants have a property interest in their employment and rank as Sergeants? (2) If so, did Appellees deprive them of that interest and violate their due process rights by demoting them without a hearing? (3) Did the trial court erroneously hold City and Cochran were entitled to judgment as a matter of law? We answer all questions in the affirmative. We reverse the trial court's order granting summary judgment in favor of the City of Edmond and Chief of Police Cochran, and remand to the trial court.

Appendix A

I.

PROCEDURAL BACKGROUND

Timothy Ray Barnthouse, Ancel Scott Fees and James Dallas Teel, II, (Appellants) are police officers for the Appellee, City of Edmond. Their employment is subject to a collective bargaining agreement (CBA), between the City and the Fraternal Order of Police, Lodge No. 136 (F.O.P.), which is governed by the Fire and Police Arbitration Act, 11 O.S. 1991 § 51-101 et seq., (the FPAA). On July 30, 1998, Appellant Fees was promoted to Sergeant, and on October 31, 1998, Appellants Teel and Barnthouse were promoted to Sergeant. Effective April 26, 2000, they were notified in writing by City's Chief of Police, Appellee Dennis Cochran, that they were being "demoted" to their previous rank. They filed grievances in accordance with the CBA. The grievances were denied by Cochran and the F.O.P., and they filed this action in district court against City and Cochran, individually and as Chief of Police. Alleging they had a protected property interest in their continued employment as Sergeants and in not being demoted without cause, Appellants sued for the following claims:

a. Violations of their due process rights, under the 14th Amendment of the Constitution of the United States, and Art. 2, § 7 of the Oklahoma Constitution;

b. Relief under 42 U.S.C. § 1983 for depriving Appellants of their constitutional rights pursuant to City's policies and a deliberate choice to demote them;

c. Negligence for breaching their duty to Appellants to administer properly the written examinations and assessment centers in accordance with their own policies and procedures;

Appendix A

d. Breach of contract;

e. Intentional infliction of emotional distress; and

f. Negligent infliction of emotional distress.

They each sought damages in excess of $10,000.00.

Cross motions for summary judgment were filed. The trial court denied Appellants' motion for partial summary judgment and granted the motions filed by City and Cochran. This appeal was brought pursuant to Supreme Court Rule 1.36, Accelerated Procedure for Summary Judgments and Certain Dismissals, 12 O.S. 2001, Ch. 15, App. 1.[1]

1. In their petition in error, Appellants raised six issues on appeal:

> 1. Whether the filing of a formal grievance by a police officer against a municipality for not properly conducting a promotional process prevents other police officers promoted from that process from obtaining a property interest in the rank they were promoted to.
>
> 2. Whether the arbitration hearing resulting in Appellants' demotions provided any protection of the Appellants' property interest in their rank of sergeant.
>
> 3. Whether the arbitrator of an arbitration hearing, where Appellants were denied participation in such hearing, has the authority to direct the City to deprive Appellants of their property interest in the rank of sergeant without due process, and to violate their contractual rights, in order to provide a remedy for another officer's grievance.
>
> 4. Whether the City breached the Collective Bargaining Agreement between the City and the F.O.P. when it demoted Appellants without cause.
>
> 5. Whether Cochran is entitled to qualified immunity where his conduct violated Appellants' right to due process

(Cont'd)

Appendix A

Appellants contend they are appealing only the orders granting Appellees' motions for summary judgment. However, the parties refer to responses and evidentiary matters attached to Appellants' motion for partial summary judgment. Therefore, the issues raised therein are considered to the extent necessary.

II.

FACTUAL BACKGROUND

Appellants took part in the promotional process for the rank of Sergeant, which is comprised of a written examination and an oral "assessment center". At the time, their rank was Detective. This process, which ended on July 29, 1998, culminated in an "eligibility list" of candidates for promotions to Sergeant. The list ranks the candidates in order of their overall scores, and Appellants' names were among the top four positions.[2] Another officer, Dennis Dill, took part in the process, but was ranked at the bottom of the eligibility list

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(Cont'd)

> (a constitutional right), and that right was violated by Cochran when it was clearly established at the time of his conduct that Appellants had a protected property interest in their rank of sergeant and had a right to due process before and after deprivation of their rank of sergeant by Cochran and the City.
>
> 6. Whether the trial court abused its discretion entering judgment for the City on Appellants' claims of breach of contract, negligence, intentional infliction of emotional distress and negligent infliction of emotional distress where the City did not move for summary judgment on these claims, no evidence or legal authority were offered in support of such judgment, and where factual issues regarding these claims remain.

2. Under the "Rule of three", the City can promote the officers from the first three names on the eligibility list. As promotions occur, the other names move up the list.

and did not receive a promotion. He filed a grievance on August 7, 1998, complaining of the manner in which the assessment center was conducted. An arbitration hearing was held on December 17, 1999. On February 23, 2000, the arbitrator held in favor of Dill on his grievance. He ruled the assessment center was conducted improperly, that the resulting eligibility list was invalid, and that the "assessment center" portion of the promotional process must be repeated. It is undisputed that the Arbitrator's ruling did **not** mention Appellants by name, did not include a finding or recommendation that **Appellants' promotions** were invalid, and did not order that Appellants must be demoted. Nevertheless, after serving as Sergeants for more than one year, Appellants were notified in writing by Cochran that, effective April 26, 2000,[3] they were being demoted as a result of the Dill arbitration award. They were also advised they must participate in the next assessment center, which they did. They did not receive promotions to Sergeant as a result of that promotional process, although two of the Appellants have since been promoted to Sergeant.

Appellants alleged in their motion for partial summary judgment their constitutional rights were violated, in that their protected property interests in their employment and rank were taken without due process, contrary to § 1983.[4]

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3. At the rank of Sergeant, Appellant Fees served from July 30, 1998 to April 26, 2000, and Appellants Teel and Barnthouse served from October 31, 1998 to April 26, 2000.

4. **42 U.S.C. § 1983 (Supp. 1996). Civil action for deprivation of rights**

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

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They also alleged Appellees breached their contractual rights not to be demoted without cause. In Cochran's motion for summary judgment, he raised defenses of qualified immunity as to Appellants' § 1983 claim, immunity as an employee of a political subdivision under the Governmental Tort Claims Act and that he was not a party to the CBA as to Appellants' breach of contract claim. In City's motion for summary judgment, it contended the invalid selection process invalidated the promotions, making them void *ab initio*; that no property interest arose as a result of the selection process; that no property interest exists in a procedure; and that Appellants bear the burden of proof that a property interest exists. City also adopted Cochran's argument as to the qualified immunity defense under § 1983.

III.

DISCUSSION

As a threshold issue, we consider the argument of City and Cochran that Appellants failed to follow the CBA in pursuing their grievance, thus failing to exhaust their remedies under the CBA. Following their demotions, Appellants filed their grievance on May 10, 2000. After Cochran denied the grievance, it was submitted to the F.O.P., which denied it on June 14, 2000. Appellants did not pursue

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(Cont'd)

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

the grievance proceeding when the F.O.P. denied their grievance. They contended, in their response to Cochran's motion for summary judgment, that they were prohibited from continuing the process because their grievance did not concern a disciplinary action. We agree.

The grievance procedure is covered in Article 10 of the CBA. Section 10.3 provides that the "F.O.P. or any employee may file a grievance" and that "[g]rievances shall be presented within fifteen (15) calendar days of said occurrence or after the F.O.P. becomes aware of said occurrence". Section 10.5 provides the manner in which grievances will be processed. In Step 1, the aggrieved employee shall present the grievance to his or her immediate supervisor, who makes a decision in writing within seven calendar days. It provides:

> STEP 1. The aggrieved employee(s) shall present the grievance to the immediate supervisor. It shall be reduced to writing citing the provision or provisions of this Agreement alleged to have been violated, be signed by the aggrieved employee(s). The immediate supervisor shall make their (sic) decision in writing to the employee within seven (7) calendar days of the date of presentation of the grievance.

If Step 1 does not settle the grievance, the aggrieved employee follows Step 2, which provides:

> STEP 2. If the grievance is not settled in STEP 1, the aggrieved employee(s) shall present the grievance to the F.O.P. Grievance Committee within seven (7) calendar days of the date of the immediate supervisor's response. The F.O.P. Grievance Committee will make a determination as to the validity of the grievance within (15)

> calendar days. If the grievance is deemed valid then the grievance will proceed to the next step. **Grievances filed concerning disciplinary actions may be processed by the employee regardless of the F.O.P. Grievance Committee's ruling.** [Emphasis supplied.]

Step 3 provides:

> STEP 3. The F.O.P. Grievance Committee or the aggrieved employee(s) shall present the grievance to the Chief of Police within seven (7) calendar days of the date of the Grievance Committee's determination. The Chief of Police shall refer the grievance to a fact-finding committee which shall be composed of four (4) members, two of which shall be selected by the Chief of Police or his designate through impartial, random choice from a list of available officers with supervisory rank, and two of which shall be selected by impartial, random choice by the aggrieved employee(s). The Chief of Police and the aggrieved employee(s) shall have seven (7) calendar days to select the fact-finding committee. The findings and recommendations of this committee must be reached and presented to the Chief of Police within fifteen (15) calendar days from the time of the selection of all parties, . . .

The emphasized language in Step 2 purports to allow the employee to process a grievance determined invalid by the F.O.P. However, the preceding sentence, "If the grievance is deemed valid then the grievance will proceed to the next step", implies the grievance ends at this step if the F.O.P. finds it is invalid. Considering these sentences together, we interpret the provision to mean that the grievance will end at

Step 2 if the F.O.P. finds the grievance is invalid **unless** it involves a disciplinary action; if it does, it continues **only if the employee pursues it further.** Any other interpretation would render the paragraph ambiguous. It is undisputed in this case that Appellants were not demoted for disciplinary reasons. Under the clear language noted above, they were given no further options under the CBA when the F.O.P. denied their grievance. Accordingly, Appellants did exhaust their administrative remedies under the CBA.

IV.

ALLEGED PROCEDURAL DUE PROCESS VIOLATIONS

A two-step inquiry is necessary to determine whether a plaintiff was denied procedural due process: (1) did the individual possess a protected interest to which due process protection was applicable? and (2) was the individual given an appropriate level of process? See *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir.1998). To allege a violation of procedural due process rights, a plaintiff must demonstrate the existence of a legitimate property or liberty interest in his employment. *Hennigh*, at 1253. There must be a "legitimate expectation of continued employment", *Id.* at 1253, citing *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The existence of a legitimate property right in employment is determined by reference to state law. *Hennigh*, at 1253, citing *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). Hennigh was a demoted police officer whose employment was governed by a CBA and the Oklahoma FPAA. The 10th Circuit Court of Appeals stated, at page 1253:

> This court has held that if state statutes or regulations place substantive restrictions on a government actor's ability to make personnel decisions, then the employee has a protected property

> interest. See *Campbell v. Mercer*, 926 F.2d 990, 993 (10th Cir. 1991) ("For example, if a statute, regulation, or policy . . . restricts the reasons for discharge to 'just cause shown,' then the employee has a right to continued employment until such grounds or causes are shown." (internal quotations omitted)).

The same analysis is used to determine if there is a protected property interest in a particular employment status, such as rank. If a statute or regulation places substantive restrictions on the discretion to demote an employee, such as providing that discipline may only be imposed for cause, then a property interest is created. *Hennigh*, at 1254, citing *Williams v. Kentucky*, 24 F.3d 1526 (6th Cir. 1994).

Based on its prior holdings interpreting Oklahoma law and the decisions of this Court[5] that matters concerning the FPAA are matters of statewide concern, the *Hennigh* Court held, at 1255:

> [P]laintiff had a legitimate property interest in his rank. This property interest was created by state law in the form of the CBA, contracted pursuant to state legislation. The CBA gave Plaintiff a legitimate expectation of continued employment as a lieutenant unless the City found "cause shown."

In the instant case, Article 7, section 7.1(f) of the CBA provides:

> The Employer, except as otherwise specifically provided for in this Agreement, retains and reserves unto itself, without limitation, all the powers, rights, authority, duties, and responsibilities conferred upon it and vested in it by the laws of the constitutions of

5. *City of Bethany v. Public Employees Relations Bd.*, 1995 OK 99, 904 P.2d 604, 607 n.4; *City of Tulsa v. Public Employees Relations Bd.*, 1990 OK 114, 845 P.2d 872, 875.

> the United States and the State of Oklahoma, the Statutes of the State of Oklahoma, and the Charter of the City of Edmond. Further, all rights, which ordinarily vest in and are exercised by employers are reserved to and remain vested in the Employer, including but not limited to the generality of the foregoing and the following managerial rights:
>
> . . .
>
> (f) To discipline, transfer, ***demote***, and discharge employees ***for cause***, subject to the grievance procedure rights set out herein in Article 10, if such action falls within the definition of grievance. [Emphasis supplied.]

Additional evidence of a property interest in Appellants' employment and rank is found in the City's General Policy Order, GPO 83-2 Revised, effective June 22, 1998, entitled "Selection Process for Promotion". It provides, under Section V, that candidates from the Assessment Center are placed on an eligibility list for one full year. "At the end of this time period the Promotional Eligibility List shall expire and shall no longer be used." It also provides that the probationary period for a recently promoted officer ends after one year. At that time, the promotion becomes permanent. GPO 86-1 Revised, effective June 22, 1998, entitled "Department Disciplinary Actions", provides that demotions[6] and terminations[7] may only be imposed for cause.

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6. 10. *Demotion to a designated Rank of Grade for Cause* -Upon approval of the City Manager, the Chief of Police may demote an employee to a lower rank or grade. Such demotion will not be made if any permanent employee in a lower rank will be laid off as a result of the demotion.

7. 11. *Termination of Employment* - Upon approval of the City Manager, the Chief of Police may terminate any permanent or temporary employee for cause.

In this case, the eligibility list was completed on or about July 30, 1998, and had expired before the Arbitrator's ruling was issued on February 23, 2000. At that time, the list could not be held "invalid"; it no longer existed. Further, under the terms of the CBA itself, which incorporates Oklahoma's FPAA, an employer's discretion to demote employees is restricted to demotions for cause. Under *Hennigh*, the CBA and the General Policy Orders noted, we hold Appellants did possess a protected property interest in their employment and rank.

As to the second step of the inquiry, we consider whether Appellants received an appropriate level of due process prior to the deprivation of the protected interest. In *Hennigh*, the Court determined that although the plaintiff did have a protected property interest in his employment and his rank, he nevertheless had received appropriate due process. The *Hennigh* plaintiff complained that his procedural due process rights were violated because the discipline imposed did not comply with the CBA's requirement for notarized complaints. The Court of Appeals stated:

> However, the Constitution does not require that each individual receive the procedural guarantees provided for by the instrument which bestows a property interest . . . The Due Process Clause of the United States Constitution entitles each citizen to notice and an opportunity to be heard prior to the deprivation of a fundamental right . . . This court stated that '[a] failure to comply with state or local procedural requirements does not necessarily constitute a denial of due process; the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause.' [Citations omitted.]

Hennigh, 155 F.3d at 1256.

Appendix A

In *Hennigh*, prior to his demotion, the plaintiff had been given an informal hearing before the Review Board. The City Manager also allowed plaintiff and his counsel an opportunity to respond to the allegations before imposing discipline. The federal Court of Appeals held this level of process met "the constitutional standard for a pre-termination hearing." *Id.* at 1256. Additionally, the Court stated the rule that a plaintiff "is not entitled to an ***extensive*** or ***formal pre-termination hearing*** if there are adequate post-termination procedures." *Id.*, citing *Benavidez v. Albuquerque*, 101 F.3d 620, 627 (10th Cir. 1996) [Emphasis supplied].[8] The Court noted other circuit courts generally hold that grievance procedures in a collective bargaining agreement can satisfy a plaintiff's entitlement to post-deprivation due process. The Court held that the CBA's grievance procedures provided Hennigh with an adequate post-deprivation remedy.

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8. City employees subjected to drug testing were terminated after a pre-termination hearing. Because the pre-termination procedures were extensive, the post-termination procedure was less important to satisfy due process. The Tenth Circuit Court held:

> [S]imilarly, we must evaluate the constitutionality of post-termination process in light of the pre-termination procedures it follows.
>
> When the pre-termination process offers little or no opportunity for the employee to present his side of the case, the procedures in the post-termination hearing become much more important . . . and where the pre-termination process has been minimal, the employee's fate may depend entirely upon the post-termination hearing . . . In contrast, when the employee has had a meaningful opportunity to explain his position and challenge his dismissal in pre-termination proceedings, the importance of the procedures in the post-termination hearing is not as great.

Benavidez v. City of Albuquerque, 101 F.3d at 627.

In *Hennigh*, the plaintiff was given the opportunity, however informal it was, to answer the complaints against him ***before his demotion.*** That opportunity was bolstered by Hennigh's post-demotion grievance proceeding, under the CBA procedures, which were deemed adequate by the Court. Appellants in the present case received neither "extensive" nor "formal" pre-demotion due process; they received ***no*** pre-demotion due process. In fact, their fate was decided by others following a hearing they could not attend. In this case, Appellants also received no benefit from adequate post-demotion proceedings because their grievance was denied. Clearly, Appellants herein were not afforded an appropriate level of due process to protect their property interests.

V.

COCHRAN'S LIABILITY

Cochran contends that as a public official, he is immune from liability for Appellants' § 1983 claim under the doctrine of "qualified immunity". In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the United States Supreme Court adopted an objective test to determine whether the doctrine of qualified immunity applies. When government officials are performing discretionary functions, they will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, at 818, 102 S.Ct. at 2738. The court will examine the law as it was at the time of the defendant's actions to determine whether the law allegedly violated was clearly established. *Id.* The plaintiff has the burden of convincing the court that the law was clearly established. *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988), citing *Lutz v. Weld County School Dist.*, 784 F.2d 340, 342-43 (10th Cir. 1986). The plaintiff

must do more than identify a clearly established right in the abstract and allege it was violated. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Once the defense is raised, the court must allow the plaintiff the opportunity to show the defendant's conduct violated the law and that the law was clearly established when the alleged violation occurred. *Pueblo Neighborhood Health Centers, Inc.* at 647. The question is a legal one for the trial court to resolve, and the court's decision should identify the law upon which it relied and state the basis for its conclusion. *Id.*

When defendants move for summary judgment on grounds of qualified immunity, the plaintiff must "come forward with facts or allegations to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the violation occurred." *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1026 (10th Cir. 1994), citing *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, supra at 646. Unless such a showing is made, the defendant prevails. *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, at 646. If the plaintiff establishes both of these matters, a defendant bears the normal burden as the movant for summary judgment of "showing that no material issues of fact remain that would defeat his or her claim of qualified immunity." *Id.* An objective standard is applied to determine whether a defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pueblo Neighborhood*, 847 F.2d at 645.

Appendix A

Cochran contends that even if Appellants had had some constitutionally protected property interest for which due process would attach, it was not so "clearly established such that reasonable officials would have understood that their conduct violated that right", citing *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998). He contends that the clearly established law required him to accept and follow the Arbitrator's ruling, whether or not he agreed with it, citing the Court of Civil Appeals' June 16, 2000, unpublished opinion in *F.O.P. and Neal v. City of Edmond*, in case number 93,932. However, reliance on *Neal* for guidance in this case was misplaced. *Neal* involved the City's refusal to enforce an arbitration award[9] arising out of a grievance filed by the officer involved, Neal. Here, however, we are concerned with whether Cochran's conduct of demoting **Appellants** was required to enforce the arbitration award arising from **Dill's** grievance. He also contends Appellants' promotions became a nullity as a matter of law and that the established law gave Appellants no more than a protected interest in continued employment, not in a particular job or rank.

In response to Cochran's motion, Appellants cited *Hennigh v. City of Shawnee*, supra, and *Dill v. City of Edmond*, supra.[10] These cases established that a property

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9. The arbitration panel overturned Neal's discharge and required his reinstatement.

10. Although the Court of Appeals ultimately held that Dill's property interest in the change of his duty schedule was *de minimis* and did not trigger procedural due process protection, the Court did hold a property interest in his employment was established. See *Dill v. City of Edmond*, 155 F.3d 1193, 1207 (10th Cir. 1998), which provides:

> In this case, an express contract, the collective bargaining agreement between the City of Edmond and the fraternal order of police, gave rise to a protected

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interest in their continued employment was created through the CBA in conjunction with state law, i.e., the FPAA, and that the same analysis is applicable to their rank, citing the CBA's requirement for "cause" to "discharge, demote or discipline" employees. Therefore, they contend, under the cases cited, which were in effect at the time, they were entitled to due process before being demoted.

In Cochran's motion on this issue, he contends that ***if*** Appellants had a property interest in their positions as sergeants, he did not deny them due process. Rather, he contends it was the F.O.P., the CBA's procedures and the Arbitrator which were responsible for denying them any such alleged right. However, the arbitrator's function is to enforce the CBA, not to protect the constitutional rights of the grievant. See *McDonald v. City of West Branch*, 466 U.S. 284, 290-291, 104 S.Ct. 1799, 1803, 80 L.Ed.2d 302, which held "because an arbitrator's authority derives solely from the contract, . . . an arbitrator may not have the authority to enforce § 1983 . . . Indeed, when the rights guaranteed by § 1983 conflict with provisions of the collective bargaining agreement, the arbitrator must enforce the agreement." [Citations omitted]. Moreover, Appellants were not grievants whose case was before the Arbitrator. Cochran also asserts Appellants can not have a constitutionally protected property interest in a position they are legally considered to have never held.

Appellants sustained their burden of naming the clearly established right, a property interest in their employment ***and***

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> property interest in Plaintiff's continued employment. The agreement provided that management could only discharge, demote or discipline employees "for cause." Thus, Plaintiff had a protected property interest in not being disciplined without cause. [Footnote omitted.]

rank, through the clearly established federal law at the time, i.e., the Tenth Circuit Court of Appeals' cases, *Hennigh* and *Dill.* While they are not Oklahoma Supreme Court cases, both cases interpret Oklahoma law and were published opinions at the time of the demotions. *Dill* was certainly known to the City of Edmond and Chief of Police Cochran. It dealt with a CBA virtually identical to the one at issue herein. Moreover, the FPAA, with which the City and Cochran were familiar, requires them to follow the terms of the CBA. Cochran responds with the claim that he had no choice except to follow the Arbitrator's ruling. This position raises material factual issues: did Cochran have to demote Appellants in order to comply with the arbitration award, thereby depriving them of their property interest and due process rights, or was there an alternative method of compliance which also complied with the law and the CBA? Did Cochran disregard the clearly established law at the time? In other words, would reasonable minds differ, or are different inferences possible, as to how to implement the ruling? We determine different inferences are possible, and summary judgment was improperly granted on this issue.

If the materials subject to consideration on a motion for summary judgment either disclose controverted material facts, or, reasonable minds might reach different conclusions even if the material facts are undisputed, a motion for summary judgment should be denied. *Perry v. Green*, 1970 OK 70, 468 P.2d 483, 488-489.

Appendix A

VI.

CITY'S LIABILITY

In its motion for summary judgment, City alleged that no property interest arose from an invalidated examination. City has cited several cases from other jurisdictions[11] which hold that an invalidated procedure is void *ab initio*. Accordingly, it is argued, if the promotional process was void, there was no promotion, no property interest and no entitlement to protection under the law against demotions.

None of the cases cited by the City pertain to Oklahoma law. Only one of the cases, *City of San Antonio v. Gonzales*, 737 S.W.2d 78 (Tex. App.1987), involves a collective bargaining agreement between a city and a police officers' association. Although the facts involve police officers promoted from an eligibility list later declared invalid, the case does not address their demotions or the rights they had acquired under the CBA after their promotions. We find City's citations of authority are inapplicable.

City acknowledges this Court has not previously addressed the issue in the context of grievance procedures and the FPAA, although it cited Oklahoma authority for the rule that generally, a void act of any kind confers no right. City also argued that because of Appellants' knowledge of the pending Dill grievance, they had no "legitimate expectation" of their continued employment, as required by *Hennigh*. However, that argument is not persuasive. Appellants correctly note in their response on this issue to

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11. *O'Grady v. Cook County Sheriff's Merit Board*, 632 N.E.2d 87 260 Ill.App.3d 529 (1994); *Trosky v. Civil Service Commission*, 652 A.2d 813 (Pa. 1995); *Ochocki v. Dakota County Sheriffs Department*, 454 N.W.2d 476 (Minn. App.1990); *Gonzales v. City of San Antonio*, 737 S.W.2d 78 (TX App.1987); and *Kaufman v. Puerto Rico Telephone Company*, 841 F.2d 1169 (1st Cir. 1988).

Cochran's motion for summary judgment that there is no provision in the CBA which allows an employee to file a grievance in anticipation of a demotion.[12] Until Appellants received the "demotion letters", they had no grievance because they had lost nothing. Appellants' knowledge of a grievance filed by another employee, without more, did not satisfy City's or Cochran's obligation to give Appellants due process before demoting them.

A municipality is a "person" for purposes of § 1983 liability. *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 98 S.Ct. 2081, 56 L.Ed.2d 611 (1978). However, a municipality's liability cannot be imposed on the basis of ***respondeat superior*** or vicarious liability. *Monell*, 436 U.S. at 691. A municipality has no immunity for immune acts of its officials, *Owen v. City of Independence*, 445 U.S. 622, 647-650, 100 S.Ct. 1398, 1413-15, 63 L.Ed.2d 673 (1980). The immunity enjoyed by the employee is not material as to the liability of the government employer. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517

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12. Nevertheless, the affidavit of Appellant Fees, attached to Plaintiffs' Reply to Cochran's Response to Plaintiffs' Motion for Partial Summary Judgment, shows that Appellants attempted to participate. It provides:

> When the grievance proceeding involving Dennis Dill was pending, I personally asked Acey Hopper, President of the Edmond FOP, if I and the other Sergeants who could potentially be affected by the arbitrator's decision (including the other two Plaintiffs herein) could either participate in or at minimum attend the arbitration hearing related to the Dill grievance.
>
> I was told that none of the Plaintiffs in this case could attend because we were not interested parties in the Dill grievance.

(1993). Although a municipality is not liable vicariously for the acts of its employees, it can be subject to direct liability if it caused a constitutional violation through a policy statement, ordinance, regulation or decision officially adopted and promulgated by the municipality's officers. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988). A municipal policy can be established by the single act of a policymaker who has final policymaking authority to bind the municipality to his actions and who has final authority to make decisions from several available alternatives. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). The municipality can be liable for the harm caused by an official with such authority because the municipal agent's status cloaks him with the municipality's authority. *Pembaur*, 475 U.S. at 481, 106 S.Ct. at 1299. It is a question of state law whether an official has final policymaking authority to bind the municipality. *Praprotnik*, 485 U.S. at 123-124, 108 S.Ct. at 924.

Appellants raised the policymaker issue in their petition. In City's response to Appellants' motion for partial summary judgment, it argued that the reduction in Appellants' rank, which followed as a result of Dill's grievance, occurred by operation of law, not because of the City. Cochran argued it was the F.O.P., CBA procedures and the Arbitrator which denied Appellants their property interests, if any, and that the clearly established law required him to demote Appellants. Appellants argued Cochran and the City failed to follow the CBA and GPO requiring cause for demotions. Cochran argued that the GPO does not **prevent** a promotion from being voided.

Cochran initiated the General Policy Orders in his capacity as Chief of Police. An inference arises that both City and Cochran, in effect, argue the policy of the City required Appellants' reduction in rank. Fact questions arise

as to: (1) whether as a policymaker, Cochran ordered the Appellants' demotions because the City's policy required it; and (2) whether **the absence** of a specific GPO provision **preventing the promotion from being voided** justifies the demotion of officers without a hearing under the City's policy. Because the trial court's orders granting summary judgment were general judgments,[13] without findings of fact or conclusions of law, and because these inferences are possible under the evidence,[14] we do not know exactly what the trial court considered. We cannot be sure the trial court did not decide fact questions reserved for a jury.

The trial court could have rendered judgment for Cochran because it found Appellants had no property interest in their employment, and therefore Cochran, individually, did not violate their due process rights. Or, the trial court could have found that although property interests existed in Appellants' employment, the law was not clearly established at the time of the demotions, and Cochran was entitled to the defense of qualified immunity. This could also result in judgment for Cochran. However, if Cochran violated Appellants' constitutional rights ***in his official capacity***, despite having qualified immunity in his individual capacity, the City could

13. The content of the orders comply with the requirements of 12 O.S. 2001 § 696.3(A). They contain: (1) a caption, setting forth the court, the names and designation of the parties, the file number and title of the instrument; (2) a statement of the disposition of the motion ("Defendant's Motion for Summary Judgment is hereby sustained"), including a statement of the relief awarded ("judgment is entered for the Defendant City of Edmond/Defendant Dennis Cochran"); and (3) the signature and title of the court. The orders were properly file-stamped, and a Certificate of Mailing, signed by the Court Clerk's Deputy, was filed. In all respects, the court's orders comprise a final judgment as to both defendants.

14. Cochran testified in his deposition that Appellants were never promoted, and therefore, were never demoted, despite his use of those terms in his correspondence to them.

be liable, although Cochran is immune. This cannot be determined from the face of the orders entered, and we must reverse and remand.

VII.

OTHER CLAIMS

Finally, Appellants contended in their petition in error that the trial court abused its discretion in entering judgment for City on their contract and tort claims. They contend these claims were not included in their motion for summary judgment and there are remaining factual issues on these claims. However, their breach of contract claim was raised in their motion for partial summary judgment, and addressed in their reply to Cochran's response. Also, their negligence claim was addressed by City, in its response to Appellants' motion for partial summary judgment, recast by City as a claim for the "negligent deprivation of property".

However, we agree that both the claims for the intentional and negligent infliction of emotional distress were not raised in the motions for summary judgment, although they were raised in the petition. On remand, these issues must be resolved by the trier of fact.

Summary judgment is improper if under the evidentiary materials, reasonable men could reach different conclusions from the facts. *Indiana Nat. Bank v. State Dept. Of Human Services*, 1993 OK 101, 857 P.2d 53. Clearly, summary judgment was improperly granted.

Appendix A

VIII.

CONCLUSION

We hold Appellants exhausted their administrative remedies under the CBA. They have a protected property interest in their employment and rank through the CBA and the FPAA, but they were denied procedural due process prior to their demotions. Material issues of fact for a jury exist as to: (1) whether Cochran violated Appellants' clearly established constitutional rights for purposes of his individual qualified immunity defense to the § 1983 claim; and (2) whether the City incurred liability for the § 1983 claim because of Cochran's conduct in his official capacity. Appellants' remaining claims of the intentional and negligent infliction of emotional distress should also be resolved by the trier of fact upon remand.

The judgment in favor of Cochran and the City of Edmond is reversed. This case is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

WATT, C.J., OPALA, V.C.J., HODGES, LAVENDER, HARGRAVE, KAUGER, JJ. - concur.

WINCHESTER, J. - concurs in part, dissents in part.

SUMMERS and BOUDREAU, JJ. - dissent.

s/ Joseph M. Watt
CHIEF JUSTICE

Appendix A

2003 OK 42

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 97,350

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES and JAMES DALLAS TEEL, II,

Plaintiffs/Appellants,

v.

CITY OF EDMOND, a municipal corporation; and DENNIS COCHRAN, individually and in his capacity as the Chief of Police of the City of Edmond,

Defendants/Appellees.

FOR OFFICIAL PUBLICATION

SUMMERS, J., Dissenting and joined by Boudreau, J.

I respectfully dissent for two reasons. The first, and most important, is that the Court exercises appellate jurisdiction over what appear to be non-appealable orders. I further dissent because Cochran is entitled to qualified immunity.

I would first request the parties to comment on whether the trial court's orders were immediately appealable because of pending claims left unadjudicated in the trial court. If the orders are indeed not immediately appealable, I would recast a portion of Plaintiffs' petition in error as an application for an extraordinary writ on the issue of Cochran's immunity, assume original jurisdiction but deny the writ (upholding a

qualified immunity defense),[1] and then decline to review the issues relating to the City of Edmond in advance of a proper appeal.[2]

I. Appellate Jurisdiction

This Court has an obligation to make a *sua sponte* inquiry into its appellate jurisdiction. *Baptist Medical Center of Oklahoma, Inc. v. Aguirre*, 1996 OK 133, n.14, 930 P.2d 213, 218; *Chickasaw Telephone Co. v. Drabek*, 1996 OK 76, n.16, 921 P.2d 333, 337. Upon a *sua sponte* inquiry into our appellate jurisdiction we generally afford the parties an opportunity to address the issue. *Conterez v. O'Donnell*, 2002 OK 67, ¶ 6, n.5, 58 P.3d 759, 760-761. The appellate record before us appears to show an order that is not immediately appealable. I would thus require a response from the parties on this issue.

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1. The Court has assumed original jurisdiction to review an order adjudicating a party's immunity to suit in a § 1983 proceeding. *See, e.g., Lambert v. Town of Stringtown*, 1992 OK 103, 834 P.2d 955; *McLin v. Trimble*, 1990 OK 74, 795 P.2d 1035; *Phillips v. Wiseman*, 1993 OK 100, 857 P.2d 50; *Powell v. Seay*, 1976 OK 22, 553 P.2d 161.

2. A qualified immunity defense does not apply to a municipality such as the City of Edmond. The Court has said that "in *Owen v. City of Independence*, 445 U.S. 622, 650, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673 (1980), we rejected a claim that municipalities should be afforded qualified immunity, much like that afforded individual officials. . . ." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). *See also Board of County Commissioners, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 677, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), ("immunity from suit under § 1983 extends to public servants only in their individual capacities"); *Whitesel v. Sengenberger*, 222 F.3d 861, 870 (10th Cir. 2000); (municipal entities and local governing bodies are not entitled to the traditional common law immunities for section 1983 claims).

Appendix A

Several summary judgment motions, responses, and replies were filed in the trial court.[3] The City of Edmond (or Edmond) sought and was granted "summary judgment." Plaintiffs noted that Edmond's motion was for only *partial* summary judgment. Plaintiffs stated that Edmond "has *completely* ignored the other claims against it, choosing not to seek judgment on Plaintiffs' breach of contract, negligence, intentional infliction of emotional distress and negligent infliction of emotional distress claims." *Plaintiffs Combined Motion to Strike and Objection to Defendant City of Edmond's Motion for Summary Judgment*, Dec. 4, 2001, at p. 11 n.6, (emphasis in original). The reply of Edmond to this motion did not contest Plaintiffs' characterization of the other pending theories not addressed by Edmond. The City of Edmond's response filed October 10, 2001, does argue that it did not breach the contract because there was a lack of finality in the selection process. At p. 13. But Edmond did not request, then or later, a judgment on the contract theory, and Edmond's motion for summary judgment filed two months later did not discuss Plaintiffs' contract or tort theories.

Plaintiffs clearly stated in the summary judgment stage that they were seeking judgment against Cochran on a theory

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3. The motions in chronological order are: (1) September 24, 2001, Plaintiffs' motion for partial summary judgment; (2) October 2, 2001, Cochran's motion for summary judgment (3) October 9, 2001, Cochran's response to Plaintiff's motion for summary judgment; (4) October 10, 2001, City of Edmond's response to Plaintiff's motion for summary judgment; (5) October 17, 2001, Plaintiffs responded to Cochran's motion for summary judgment; (6) November 1, 2001, Plaintiffs filed a reply to the City's response; (7) November 1, 2001, Plaintiffs replied to Cochran's response; (8) November 19, 2001, the City of Edmond's motion for summary judgment; (9) December 4, 2001, Plaintiffs' motion to strike the City's motion for summary judgment and response to motion; and (10) December 10, 2001, City of Edmond responded to Plaintiff's motion to strike and response.

that he violated their constitutional rights, and not on contract or tort theories based upon state law.[4] The appellate record appears to show that Cochran has been granted judgment in his favor on the only theory pressed against him. Further, Edmond has been granted summary judgment in its favor on a theory that it violated the Due Process Clause, but not on the contract and tort theories urged by Plaintiffs against Edmond.

I first note that the judgment has no certification authorized by 12 O.S. 2001 § 994. Secondly, when theories arise from the same transaction or occurrence they are the same claim (or cause of action) for purpose of requiring their adjudication prior to an appeal. See *Liberty Bank and Trust Co. v. Rogalin*, 1996 OK 10, ¶ 9, ¶ 11 n.3, 912 P.2d 836, 838, 839, where we indicated that affirmative defenses and compulsory counterclaims must be adjudicated when a court adjudicates the related cause of action, and that a trial court lacks the power to certify for appellate review an order that splits a cause of action[5]. This means that when a plaintiff

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4. See Plaintiffs' Response filed on October 17, 2001, at n.4, pp. 5-6, where they state that the only claim that they are bringing against Cochran is based upon the Due Process Clause and not tort or contract theories.

5. *Liberty Bank & Trust Co.* relies upon "the same transaction or occurrence" definition of a cause of action or claim for relief. See the definition for "cause of action" in *Retherford v. Halliburton Company*, 1977 OK 178, ¶ 11, 572 P.2d 966, 968-969; *Chandler v. Denton*, 1987 OK 38, ¶ 13, n.20, 741 P.2d 855, 863-864; *Resolution Trust Corp. v. Greer*, 1995 OK 126, ¶ 11, n.5, 911 P.2d 257, 260; and *Greenberg v. Wolfberg*, 1994 OK 147, n.42, 890 P.2d 895.

A cause of action cannot be split or divided into several lawsuits. *Christian v. American Home Assur. Co.*, 1977 OK 141, 577 P.2d 899, 905. A cause of action may not be split into more than one judgment because a judgment is, by definition a final determination of a single

(Cont'd)

presses theories pursuant to 42 U.S.C. § 1983 *and* breach of contract, and the same transaction or occurrence is used for both the contractual and § 1983 judicial relief, then only one claim or cause of action is brought by that plaintiff.

A "partial summary judgment" or partial summary adjudication is not an appealable order. *Reams v. Tulsa Cable Television, Inc.*, 1979 OK 171, 604 P.2d 373, 376; *Allen v. Lynn Hickey Dodge, Inc.*, 2001 OK 93, 39 P.3d 781, 789, (Opala, J., concurring). In the case before us, this principle means that a cause of action must thus be completely adjudicated on both the contract and § 1983 theories as a prerequisite to an appeal from a judgment[6] on that cause of action or claim for relief.

The United States Supreme Court has stated that claim preclusion may, pursuant to State law, be used to bar a § 1983[7] action when the claim in the § 1983 action arises

(Cont'd)

cause of action, and in the creation of a judgment the cause of action is merged into the judgment — the cause of action ceases to exist. *See* note 7 *infra*. *See also Liberty Bank and Trust Co. v. Rogalin*, 1996 OK 10, n.2, 912 P.2d 836, 838-839, (a transaction or occurrence cannot be split into two claims).

6. A judgment is a final determination of the rights of the parties with respect to a particular cause of action or claim for relief. 12 O.S. 2001 § 681. *See City of Lawton v. International Union of Police Associations, Local 24*, 2002 OK 1, ¶ 5, 41 P.3d 371, 374. *See also Federal Deposit Ins. Corp. v. Tidwell*, 1991 OK 119, 820 P.2d 1338, 1341, (there is only one "judgment" or one final judicial determination upon a single cause of action). Upon entry of a judgment the cause of action is merged into the judgment and the cause of action ceases to exist. *Johnson v. State ex rel. Department of Public Safety*, 2000 OK 7, ¶ 9, 2 P.3d 334; *Black v. Russell*, 1927 OK 485, ¶ 12, 266 P. 448.

7. Section 1983 is not a "cause of action" but a statutory remedy for judicial relief based upon the particular transaction or occurrence at

(Cont'd)

from the same transaction or occurrence that was previously used as a basis for an action in contract. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). Similarly, the United States Court of Appeals for the Tenth Circuit has explained that res judicata will bar a § 1983 action filed in a federal court when it follows an action filed in an Oklahoma state District Court involving the same transaction or occurrence, i.e., a previous adjudication on the same claim will bar a subsequent § 1983 action. *Jarrett v. Gramling*, 841 F.2d 354 (10th Cir. 1988). *Jarrett* involved a police officer terminated from employment who filed a mandamus proceeding for the purpose of obtaining a hearing, and then later filed a § 1983 lawsuit alleging, in part, that he did not receive a hearing. *Id.* 841 F.2d at 355.

I would call for a response from the parties on the appealability question before issuing an opinion in the case.

II. Qualified Immunity

Qualified immunity is an immunity from suit by government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). The Court stated that using an objective reasonableness test "avoids the unfairness of imposing liability on a defendant who 'could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to know that the law

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(Cont'd)

issue. The High Court has explained that section 1983 "creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

forbade conduct not previously identified as unlawful.'" *Crawford-El v. Britton*, 523 U.S. at 590, *quoting*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Thus, the inquiry shifts to whether the law identified a particular official's conduct as unlawful at the time the conduct occurred.

In applying qualified immunity a court must define the particular right at issue to determine if it was "clearly established," and if so, then qualified immunity does not apply. At one end of the spectrum a right may be defined so broadly that the immunity would seldom apply, and at the other end a right could be defined so narrowly that qualified immunity would apply in almost every case. The High Court explained:

> [T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: **The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified**

> **immunity unless the very action in question has previously been held unlawful,** see *Mitchell*, *supra*, 472 U.S. at 535, n.12, 105 S.Ct. at 2820, n.12; **but it is to say that in the light of pre-existing law the unlawfulness must be apparent.**

Anderson v. Creighton, 483 U.S. 635, 639-640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), emphasis added and material omitted). *See also Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998).

The Tenth Circuit has stated that a plaintiff need not show a pre-existing case that is factually identical.

> Qualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue unlawful. Rather, the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer. *Id.* "This ordinarily means that there must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."

Lawmaster v. Ward, 125 F.3d 1341, 1350 (10th Cir. 1997), *quoting*, *Garramone v. Romo*, 94 F.3d 1446, 1451 (10th Cir. 1996).

But there must be some authority "on point" showing that the officials' conduct violate a clearly established right. *Id.*

The opinion of the Court concludes that Plaintiffs met their burden of showing a clearly established right in that

they possessed a property interest in their rank. The opinion fails to address the pivotal issue underlying both Plaintiffs' claim and Cochran's defense of immunity — the authority of the arbitrator and Edmond's duty to follow the arbitrator's ruling. Simply, the Court focuses on a "right" without considering the corresponding "duty" of Cochran.[8]

The opinion of the Court states that the arbitrator ruled that the promotional process was invalid, but the ruling did not mention Plaintiffs and "did not include a finding or recommendation that **Appellants' promotions** were invalid." Slip Opin. at ¶ 4, (emphasis in original). That is true. But instead of focusing on what the arbitrator did not say, let us look at what the arbitrator did actually say and what those words mean:

> I further find that as a result of the significant contractual violations committed during the promotional exam on July 29, 1998 renders it void, as well as the promotional list resulting from the application of that test, and hereby order that another examination and assessment center be conducted that is in full compliance with GPO 83-2 (revised).

Motion for Summary Judgment, Sept. 24, 2001, Plaintiffs Exhibit D, at pg.18.

The arbitrator did say that the "**promotional exam**" is "**void,**" and say that the "**promotional list**" generated from that "**void**" exam is also "**void**". The promotional process, including the exam, was created by the collective bargaining agreement — a contractual obligation.

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8. A "right" possessed by one entity exists in conjunction with a corresponding "duty" by a different entity. *See Silver v. Slusher*, 1988 OK 53, n.28, 770 P.2d 878, 884, *quoting*, W. Hohfeld, *Fundamental Legal Conceptions*, 78, (1923).

Appendix A

The word "void" is a legal term of art that was used by an arbitrator in a ruling on interpreting a contract. *Harkrider v. Posey*, 2000 OK 94, ¶ 11, 24 P.3d 821, 827. The arbitrator did not hold that the promotion process was merely "invalid." He stated that the promotion process was a nullity. What impact does this have on the Plaintiffs? The contract provides for a promotional process that includes an examination and provides that a certain number of officers will be promoted based upon their ranking within the process. The officers are competing with each other for a limited number of promotional placements. If a particular placement process and associated examination is a contractual nullity — so too, *arguably*, are any promotions springing from that void process. Cochran's actions were *arguably* correct, and by use of that word, I mean his actions were reasonable in light of then existing precedent. The reasonableness of Cochran's actions in light of precedent shows that he is entitled to immunity.

One court has explained that "there are two levels at which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner in which this right applies to the actions of the official must also be apparent." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). The Court continued: "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Id.* (*citing Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)).

In this case, there were competing, conflicting, and unclear legal forces operating upon the chief when he made his decision to return Plaintiffs to their former rank. On one hand, section 7.1(F) of the collective bargaining agreement provided that a permanent employee may be demoted only for cause, subject to the "disciplinary grievance procedures . . . if such action falls within the definition of grievance." On the other hand, until today, the law was unclear as to

whether the arbitrator's ruling constituted cause for returning Plaintiffs to their former rank. Further, Cochran's decision concerning Plaintiffs had nothing to do with "discipline." And finally, Cochran's reluctance not to follow the arbitrator's ruling was objectively reasonable since, in a very recent case, he had chosen not to follow the ruling of an arbitrator, only to be told by the trial court (subsequently affirmed by the Court of Civil Appeals) that he had to follow the arbitrator's ruling whether it was right or not. *Neal v. City of Edmond*, No. 83,932, (Okla. Civ. App. June 16, 2000), *cert. denied*, October 17, 2000.

Generally, courts refuse to review the merits of an arbitration award under collective bargaining agreements. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). If an arbitrator is arguably construing or applying the contract and acting within the scope of his authority, and not acting through fraud or dishonesty the arbitrator's decision is enforced by courts. *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). This Court has said that "Only when the 'arbitrator's words manifest an infidelity to this obligation' will courts refuse to enforce the award." *City of Yukon v. International Ass'n of Firefighters, Local 2055*, 1990 OK 48, 792 P.2d 1176, 1180, *quoting*, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597. We further said that "this Court may only consider whether the arbitrator's decision 'draws its essence from the collective bargaining agreement.'" *City of Yukon v. International Ass'n of Firefighters, Local 2055*, 792 P.2d at 1179, *quoting*, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

This Court has adopted the concept from federal law that an arbitrator's ruling should be followed whether right or not. *City of Yukon*, *supra*. The Court now, for the first time,

puts officials on notice that they may not in good faith rely upon an arbitrator's ruling, even though the parties have previously made that ruling contractually binding.

The Court's opinion states that a void promotional process has no impact on Plaintiffs because their names were not in the arbitrator's order. This conclusion rests upon some assumptions that cannot be made. First, did the arbitrator have the power to issue a decision binding on Edmond stating that the promotional process and exam were void? The collective bargaining agreement states that a grievance may include an interpretation as well as an application of rights created by the contract. The contract states that the arbitrator may make "recommendations" as part of the arbitrator's decision. And it states that the arbitrator's ruling is binding.

Secondly, assuming that the decision of the arbitrator to void the promotional process was in excess of the arbitrator's power — is the decision of the arbitrator itself void or voidable? The Court's opinion necessarily implies the former when it denies Cochran his immunity. This too, I believe is error.

The City of Edmond and the F.O.P. considered the arbitrator's order to be based upon the essence of the collective bargaining agreement. In my view, an arbitrator's power under a collective bargaining agreement to review the validity of a promotional exam includes the power to declare the exam void as to all applicants of that exam when the contracting parties to the collective bargaining agreement have a contractual intent to create such power. The F.O.P. and the City of Edmond thought that the arbitrator in this case had such power, and this Court should not lightly cast aside what the parties intended. The Court does so by stating that the Plaintiffs' possessed a right that was clearly established — a right held by Plaintiffs that required the City

of Edmond to ignore an order of an arbitrator that was made binding on Edmond according to a collective bargaining agreement.

Generally, as a matter of Oklahoma jurisprudence, when parties to a compulsory obligation act in conformity therewith this Court does not penalize them for their failure to anticipate a legal decision holding the compulsory obligation to be void. One example of this occurs in the context of the conduct of public officials following compulsory statutes later adjudicated to be void, and this Court's recognition that people rely upon the validity of statutes until they determined to be unconstitutional (void). *See, e.g., Ethics Commission of State of Okla. v. Cullison*, 1993 OK 37, 850 P.2d 1069, 1079; *General Motors v. Oklahoma County Board of Equalization*, 1983 OK 59, 678 P.2d 233, 238-241, *cert. denied*, 466 U.S. 909, 104 S.Ct. 1689, 80 L.Ed.2d 163 (1984).[9] A similar concept occurs in contract jurisprudence where this Court recognizes that the conduct on one party may create an estoppel so that the other party need not comply with a written provision in a contract. *See, e.g., Knittel v. Security State Bank, Mooreland*, 1979 OK 47, 593 P.2d 92, 95-96. The common legal principle is that parties acting in good faith while attempting to fulfill compulsory obligations are not penalized for their good-faith conduct.

What this concept has to do with our controversy today is simply this — the Court penalizes the "good faith" of Cochran's act in attempting to follow the compulsory obligation of the arbitrator's ruling, and strikes a blow at the

9. The act of reliance by a person upon the conduct of others as justification for that person's conduct of his or her affairs is a doctrine of equity jurisprudence. *See, e.g., Waters v. Stevens*, 1947 OK 4, 176 P.2d 808, 811-812; *Luschen v. Stanton*, 1943 OK 177, 137 P.2d 567, 569. *Accord, Russell v. Board of County Commissioners, Carter County*, 1997 OK 80, 952 P.2d 492, 503, (elements of promissory estoppel discussed).

purpose of qualified immunity. Qualified immunity has been known as a "good faith" immunity. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). One reason for this is that the immunity was designed to shield officials when they could not reasonably anticipate that their conduct would give rise to liability. 468 U.S. at 195. The official's good faith is measured by an objective standard. *See* C. Richey, *Manual on Employment Discrimination and Civil Rights Actions in the Federal Courts*, E-12-14 (rev. ed. 1988), (Judge Richey explains *Harlow v. Fitzgerald*, *supra*, and *Anderson v. Creighton*, *supra*). As previously pointed out, the immunity "avoids the unfairness of imposing liability on a defendant who 'could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to know that the law forbade conduct not previously identified as unlawful.'" *Crawford-El v. Britton*, *supra*.

The City of Edmond states that it was required to vacate the promotions by an order made by arbitration that it considered to be binding. The F.O.P. evidently considered the arbitrator's order to be binding on the City of Edmond and the F.O.P. Could Cochran have reasonably known that following the arbitrator's order would give rise to liability?

The Court's opinion does not cite to a single binding precedent pre-dating Cochran's act that would inform him that he must disregard the arbitrator's decision considered as binding by the City of Edmond. The facts are sufficiently developed to show that Cochran is entitled to the immunity. Under the facts of this case, I do not believe that Cochran transgressed a bright line. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, *supra*. I believe that Cochran is thus entitled to qualified immunity.

In sum, I would have the parties brief the issue of the Court's appellate jurisdiction. In the event that the Court has no appellate jurisdiction I would recast the petition in error as an application for a writ, then assume original jurisdiction and deny the writ, thus recognizing Cochran's qualified immunity. I would decline to address whether the interlocutory "judgment" in favor of the City of Edmond was correct.

Appendix A

2003 OK 42

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

No. 97,350

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES and JAMES DALLAS TEEL, II,

Plaintiffs/Appellants,

vs.

CITY OF EDMOND, a municipal corporation and DENNIS COCHRAN, individually and in his capacity as the Chief of Police of the City of Edmond,

Defendants/Appellees.

For official publication

Winchester, Justice, concurring in part, dissenting in part.

The case at bar involves an action against the City of Edmond and its Chief of Police, Appellee Dennis Cochran, filed by police officers, appellants herein, who are employed by Appellee City of Edmond. Appellants employment is subject to a collective bargaining agreement governed by the Fire and Police Arbitration Act, codified at 11 O.S. 2001, § 51-101 *et seq.* Appellants were promoted to the rank of sergeant and subsequently notified in writing by Appellee Cochran that they had been demoted to their previous rank. They filed grievances in accordance with the collective bargaining agreement, arguing they had a property interest in their continued employment as sergeants and had been

demoted without cause. The portion of the majority's opinion today with which I take issue involves appellants' claim against Appellee Cochran under 42 U.S.C. § 1983. For the reasons stated herein, I respectfully dissent to section V of the majority's opinion, involving Cochran's liability. I would uphold the trial court's entry of judgment in favor of Cochran on this issue.

Cochran is entitled to qualified immunity under *Butz v. Economou*, 483 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895. Cochran contends that the clearly established law required him to accept and follow the arbitrator's ruling, whether or not he agreed with it. This ruling provided that appellants were to be demoted. Cochran relied upon *F.O.P. and Neal v. City of Edmond*, case number 93,932, an unpublished opinion of June 16, 2000, by the Court of Civil Appeals, in his belief that clearly established law required him to accept and follow the arbitrator's ruling.

The majority opinion states that Cochran's reliance on *Neal* "was misplaced." This finding is immaterial, given that Cochran's reliance on *Neal* was reasonable. I would adopt the rationale espoused by the United States District Court for the Western District of Oklahoma in *Terrapin Leasing, Ltd. v. United States*, 449 F.Supp. 7, (W.D.Okla.1978). That court, in addressing the issue of qualified immunity as applied to federal officers, which has been held identical to the immunity doctrine applied in 42 U.S.C. § 1983 actions to immunity of state officials[1], stated: ". . . the issue is not the officers' attitude generally but whether they believed they were acting in accordance with the law. . . ."

In *Terrapin Leasing*, Internal Revenue Service agents were accused of violating a corporation's rights under the

1. *See* footnote 3, *Terrapin Leasing, Ltd. v. United States*, 449 F.Supp. 7, 9 (W.D.Okla.1978).

Fourth and Fifth Amendments to the United States Constitution when they levied upon and seized certain automobiles to satisfy an alleged unpaid tax liability of the corporation's president and sole owner. The court held that the doctrine of qualified immunity barred any recovery against the individual IRS agents, holding among other issues, that the seizure was not in bad faith or unreasonable and was accomplished under the instructions of an IRS attorney. Citing a similar factual situation that occurred in the Tenth Circuit case of *G.M. Leasing Corp. v. United States*, 560 F.2d 1011 (10th Cir. 1977), the court in *Terrapin Leasing, Ltd.*, held that since the officers believed they were acting in accordance with the law, they were entitled to qualified immunity.

In the instant matter, I would hold that Cochran's reliance upon the *Neal* case for guidance, even if misplaced, constitutes convincing evidence that he reasonably believed he was acting in accordance with the law, thereby entitling him to qualified immunity from liability under § 1983. As the United States Supreme Court stated in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, quoting from *Scheuer v. Rhodes*, 416 U.S. at 247-248, 94 S.Ct. at 1692.

> "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity. . . ."

I would hold that Cochran had reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that he must comply with the arbitrator's decision, and that this belief affords him a basis for qualified immunity. To the extent that today's majority opinion diverges from this conclusion, I must dissent.

APPENDIX B — ORDER OF THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA DATED AND FILED JANUARY 17, 2002

IN THE DISTRICT COURT OF OKLAHOMA COUNTY STATE OF OKLAHOMA

CJ-2001-1988

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES and JAMES DALLAS TEEL, II,

Plaintiffs,

vs.

CITY OF EDMOND, a municipal corporation and DENNIS COCHRAN, individually and in his capacity as the Chief of Police of the City of Edmond,

Defendants.

ORDER

Before this Court is a Motion for Summary Judgment filed by the Defendant, Dennis Cochran. Based on the briefs and arguments of counsel, the Court finds the Defendant's Motion for Summary Judgment should be sustained and judgment should be entered for the Defendant Dennis Cochran.

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment is hereby sustained, and judgment is entered for the Defendant Dennis Cochran.

Dated this 17th day of January, 2002

s/ Carolyn R. Ricks
CAROLYN R. RICKS, District Judge

Supreme Court, U.S.
FILED
SEP 22 2003
OFFICE OF THE CLERK

No. 03-116

In The
Supreme Court of the United States

DENNIS COCHRAN, individually and in his capacity as the Chief of Police of the City of Edmond,

Petitioner,

v.

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES, and JAMES DALLAS TEEL, II,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

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COUNTER-STATEMENT OF THE CASE

1. At all material times, Respondents, Timothy Ray Barnthouse, Ancel Scott Fees and James Dallas Teel, III, were commissioned police officers employed by the City of Edmond. All three Respondents competed in a promotional process for the rank of Sergeant, which is comprised of a written examination and an oral "assessment center." This process ended July 29, 1998, which resulted in an "eligibility list" for promotions to Sergeant. This eligibility list was in effect for a period of one year only. The eligibility list placed the officers in order of their overall scores, and listed the Respondents in the top four positions, resulting in all three being promoted to the rank of Sergeant. Another officer who competed for promotion to Sergeant, Dennis Dill, placed at the bottom of the list and was not promoted.

2. On August 7, 1998, Dennis Dill filed a grievance, complaining of the manner in which the assessment center was conducted. On December 17, 1999, over a year after Respondents were promoted to the rank of Sergeant, and after the eligibility list had expired, an arbitration hearing on Dennis Dill's grievance was conducted. On February 23, 2000, the arbitrator ruled the assessment center was conducted improperly, the resulting eligibility list was invalid, and the assessment center portion of the promotional process must be repeated.

3. It is undisputed that the arbitrator's ruling did not mention any of the Respondents by name, did not include a finding or recommendation that Respondents' promotions were invalid, and did not order the Respondents demoted. Nevertheless, after serving as Sergeants for more than a year, Respondents were notified in writing by Petitioner Dennis Cochran, Chief of the City of Edmond Police Department, that effective April 26, 2000, they were

being demoted. Respondents were also notified they must compete in the next assessment center, which they did, but were not promoted back to the rank of Sergeant.

4. Respondents filed a lawsuit and then a motion for partial summary judgment alleging their constitutional rights were violated, because their protected property interests in their employment and ranks were taken without due process, contrary to 42 U.S.C. § 1983. Petitioner filed a motion for partial summary judgment, raising the defense of qualified immunity and addressing other state tort claims. The City of Edmond filed a motion for partial summary judgment contending the invalid selection process invalidated the promotions, making them void *ab initio*, and that no property interest arose as a result of the selection process, that no property interest exists in a procedure, and that Respondents bear the burden of proof that a property interest exists. The City of Edmond also adopted Petitioner's argument as to the qualified immunity defense. The trial court granted summary judgment on all claims to Petitioner and the City of Edmond and denied the Respondents' motion for partial summary judgment, all without comment.

5. Respondents appealed to the Oklahoma Supreme Court and requested the Supreme Court retain the case for disposition. The Oklahoma Supreme Court reversed judgment in favor of Petitioner and the City of Edmond and remanded the case back to the trial court for further proceedings. Oklahoma Supreme Court Vice Chief Justice Watt identified the dispositive questions in the appeal as: (1) Did Appellants have a property interest in their employment and rank as Sergeants?; (2) If so, did Appellees, the City of Edmond and Dennis Cochran, deprive them of that interest and violate their due process rights by demoting them without a hearing?; and (3) Did the trial

court erroneously hold the City of Edmond and Dennis Cochran were entitled to judgment as a matter of law? The Oklahoma Supreme Court answered all three questions in the affirmative.

6. The Oklahoma Supreme Court found the Respondents had property interests in their ranks, the City of Edmond and Petitioner deprived them of those interests and violated their rights to due process. Petitioner argued that the applicable law of due process was not so "clearly established such that reasonable officials would have understood that their conduct violated that right", citing *Dill v. City of Edmond, Oklahoma,* 155 F.3d 1193 (10th Cir. 1998). The Oklahoma Supreme Court disagreed.

7. Petitioner argued that the clearly established law at the time of Respondents' demotion required him to follow the arbitrator's ruling, citing principally to an unpublished opinion by the Oklahoma Court of Civil Appeals, *Fraternal Order of Police Lodge 136 and Adrian Neal v. City of Edmond, Oklahoma,* case number 93,932. Petitioner emphasizes the *Neal* opinion in an attempt to convince this Court that his own experience with the law regarding arbitration reasonably supports his deprivation of Respondents' property interests and rights to due process.

8. Unpublished decisions by the Court of Civil Appeals are not binding law, and are not to be cited as precedent. Oklahoma statutory law, 20 O.S. § 30.5, in part, states:

> The Court of Civil Appeals shall effect disposition of cases assigned to it by a written opinion prepared in such form as the Supreme Court prescribes. *No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it*

> *shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter*. (emphasis added).

Furthermore, the Oklahoma Supreme Court correctly determined Petitioner's reliance on this unpublished opinion was misplaced:

> ¶ 22 . . . He contends that the clearly established law required him to accept and follow the Arbitrator's ruling, whether or not he agreed with it, citing the Court of Civil Appeals' June 16, 2000, unpublished opinion in *FOP and Neal v. City of Edmond*, in case number 93,932. However, reliance on *Neal* for guidance in this case was misplaced. *Neal* involved the City's refusal to enforce an arbitration award arising out of a grievance filed by the officer involved, Neal. Here, however, we are concerned with whether Cochran's conduct of demoting Appellants was required to enforce the arbitration award arising from Dill's grievance.

Next, the Oklahoma Supreme Court determined what the law of due process was at the time Petitioner demoted Respondents, and that Petitioner and the City of Edmond were actually aware of the clearly established law:

> ¶ 25 Appellants sustained their burden of naming the *clearly established right*, a property interest in their employment and rank, through the *clearly established federal law at the time*, i.e., the Tenth Circuit Court of Appeals' cases, *Hennigh* and *Dill*. While they are not Oklahoma Supreme Court cases, both cases interpret Oklahoma law and were *published opinions* at the time of the demotions. *Dill* was certainly known

> to the City of Edmond and Chief of Police Cochran. It dealt with a CBA virtually identical to the one at issue herein. (emphasis added).

Finally, Petitioner repeatedly argues *Neal* influenced his decisions (Petitioner's Statement of the Case at ¶ 14), and that experience with the *Neal* case reinforced the commonly held notion in the City of Edmond that appeal of Dill's grievance would prove foolhardy. (Petitioner's Statement of the Case at ¶ 15). Petitioner even cites Mr. Justice Winchester's dissenting opinion, which stated in part:

> Cochran relied upon *FOP and Neal v. City of Edmond*, case number 93,932, an unpublished opinion of June 16, 2000, by the Court of Civil Appeals, in his belief that clearly established law required him to accept and follow the arbitrator's ruling.

It was plainly impossible for Petitioner and the City of Edmond to rely on *Neal* as justification for demoting Respondents. The June 16, 2000 unpublished *Neal* decision was not issued until almost two months *after* Petitioner demoted Respondents on April 26, 2000, thereby depriving them of their property interest and right to due process.

10. Petitioner attempts to justify his deprivation of Respondents' rights to due process by stating he never *believed* the Respondents were "demoted" as that term is used in the "CBA" and the policies of the Edmond Police Department. (Petitioner's Statement of the Case at ¶ 12) (emphasis added). However, it was the Petitioner who used the term, "demoted," in his April 26, 2000 letter addressed to Respondents advising them they were being

"demoted" as a result of the arbitration award. (Appendix A at p. 5a)[1]

11. Petitioner's self-serving assertions of alleged, not established, facts in paragraph 9 of his Statement of the Case should not be in the record before this Court. The facts are not undisputed as established by the Oklahoma Supreme Court nor are they material to this dispute. Their inclusion is simply Petitioner's attempt to persuade the Court he is a good person. In addition, Petitioner states he "permitted" Respondents to continue in their positions as Sergeants. In fact, Petitioner promoted Respondents to the ranks of Sergeant *after* Dill filed his grievance, despite the obvious possibility of an adverse ruling in the ongoing proceedings.

12. Similarly at paragraph 14 of his Statement of the Case, Petitioner again attempts to present self-serving facts not in the record before this Court. Petitioner emphasizes events alleged to have improperly influenced the *Neal* arbitration proceedings. Even if such "facts" were properly considered by this Court, they are so remote that their relevance to this case is less than negligible.

13. Petitioner mischaracterizes the record at paragraph 15 of his Statement of the Case where he states the Respondents failed to "successfully test" and that was the reason for their lawsuit against the City of Edmond and the Petitioner. In fact, one of the Respondents did perform well on the second assessment center, ranking fifth overall. Respondent, *in his discretion, chose not to allow* Tim Barnthouse to continue to serve as a Sergeant, by refusing

[1] "Appendix A" refers to Appendix A to Petitioner's Petition for Writ of Certiorari.

to exercise the discretionary "rule of three" allowed Petitioner pursuant to the CBA. (Appendix A. at p. 4a, n. 2). Therefore, the assertion that the Respondents did not "successfully place, as a result of the second assessment center" is false. (Petitioner's Statement of the Case at ¶ 12). Furthermore, the reason for Respondents' lawsuit is obvious – they were deprived of their property interests and due process rights *when they were demoted*, not when they retested.

REASONS FOR DENYING THE WRIT

Respondents file this brief in opposition to address not only the merits of the Petitioner's arguments but also to correct misstatements and material omissions in the Petition for Certiorari. *See* SUP. CT. R. 15(2).

I. The Only Immediately Appealable Issue Over Which This Court Has Jurisdiction Is the Discrete Question Of Law Determined by the Oklahoma Supreme Court and Challenged by Petitioner. The Oklahoma Supreme Court's Factual Determinations Are Not Immediately Appealable.

In *Johnson v. Jones,* 515 U.S. 304 (1995), this Court discussed at length the types of determinations that are subject to interlocutory appeal when a defendant is denied qualified immunity at the summary judgment stage. In so doing, this Court held that a defendant invoking qualified immunity may *not* appeal the denial of summary judgment insofar as the denial determines whether the pretrial record sets forth an issue of fact for trial. *Johnson,*

515 U.S. at 319-320. The Court, refusing to further extend its determination in *Mitchell v. Forsyth,* 472 U.S. 511 (1985), made clear the qualified immunity issue subject to immediate appeal is only whether or not "certain *given facts* showed a violation of 'clearly established' law." *Johnson*, 515 U.S. at 311 and 313 (citations omitted) (emphasis added).

While Petitioner does acknowledge in writing that "the operative facts are clear" (Pet. at 15), throughout his Statement of the Case, he re-characterizes the decided evidence in order to buttress his argument that the Oklahoma Supreme Court inappropriately denied Petitioner qualified immunity. For example, Petitioner repeatedly glosses over the Oklahoma Supreme Court's express determination that Respondents were demoted. (Appendix A at p. 5a). Instead, he characterizes his demotions of the Respondents as a forced reduction in rank that was followed by the Respondents' own failures to "successfully place" in the second Assessment Center. (Pet. at 4, ¶ 9 and ¶ 11). The record is clear, and the Oklahoma Supreme Court unequivocally determined that Petitioner demoted Respondents effective April 26, 2000. (Appendix A at p. 5a).

The trial court failed to determine a single factual issue and it did not expressly state the legal basis for its determination. Its rulings on both the City's (not at issue here) and Petitioner's motions for summary judgment were concise but included no findings of fact or law whatsoever. (Appendix B at p. 43a). However, the trial court's bare order is not unusual, nor does it create any additional burden for this Court. This is so because the Oklahoma Supreme Court undertook a cumbersome review of the record and determined the facts necessary to its and this Court's decisions. Given this, the facts determined below

are to be taken "as given" by the Oklahoma Supreme Court. *Johnson*, 515 U.S. at 319. Therefore, Petitioner's implicit arguments related to and mischaracterizing the factual findings of the Oklahoma Supreme Court must be ignored. The April 22, 2003 opinion of the Oklahoma Supreme Court sets forth all facts relevant to the single issue now before this Court.

Furthermore, Petitioner repeatedly injects his own subjective beliefs and motivations into the record in order to convince the Court that he was doing what he personally believed was lawful. (Pet. at p. 4, ¶ 12 and p. 6 at ¶ 14). However, this Court has repeatedly held in the context of a qualified immunity defense, an official's *subjective* belief in the lawfulness of his conduct is irrelevant. *Harlow v. Fitzgerald,* 457 U.S. 800, 815-819 (1982). Therefore, this Court should also reject Petitioner's repeated attempts to inject his own subjective motivations and beliefs into the isolated issue before it.

Next, Petitioner does not take issue with the determination by the Oklahoma Supreme Court that the Respondents had property interests in their ranks as Sergeants. Petitioner does in a single and discrete sentence write: "[t]he issue is whether the property interest identified by the Oklahoma Supreme Court in positions gained through an invalidated promotion process remain, or ever became property in the sense of fully vesting in the Respondents." (Pet. at p. 28). This implies Petitioner does not agree Respondents had property interests in their ranks; however, completely absent from the entire brief and any of the questions Petitioner presents for review is any argument that the Respondents did not have property interests or that they were not entitled to due process. Thus, it is apparent that Petitioner has accepted the determination – and on this point the Oklahoma Supreme Court was

unanimous – that the Respondents had protected property interests in their ranks as Sergeants entitling them to due process.

Similarly, at no time does Petitioner argue that Respondent's rights to due process were not violated. He does not seek appeal of the Oklahoma Supreme Court's express determination – and the Oklahoma Supreme Court was also unanimous on this issue – specifically finding Respondents "in the present case received neither 'extensive' nor 'formal' pre-demotion due process; they received ***no*** pre-demotion due process. In fact, their fate was decided by others following a hearing they could not attend. In this case [Respondents] received no benefit from adequate post-demotion proceedings because their grievance was denied. Clearly, [Respondents] herein were not afforded an appropriate level of due process to protect their property interests." (Appendix A at p. 14a) (emphasis in original).

In sum, the only issue currently before this Court is whether to grant certiorari and review the Oklahoma Supreme Court's determination that the Respondents' property interests in their ranks as Sergeants were clearly established at the time Petitioner demoted Respondents without due process. This is the *only* issue upon which certiorari may be properly granted. The factual determinations are not subject to interlocutory appeal and are to be accepted by this Court as given. The other legal rulings of the Oklahoma Supreme Court are not challenged by Petitioner. (*See also* Pet. at p. 25)

II. This Court Should Deny Certiorari Because the Oklahoma Supreme Court Was Correct In Its Determination That the Law Establishing Respondents' Rights To Due Process Was Clearly Established When the City and Petitioner Demoted Respondents On April 26, 2000.

Petitioner continues to insist this Court's rulings on qualified immunity compel the determination that he is entitled to summary judgment. His principal argument is that, according to him, the Oklahoma Supreme Court only first established the property right at issue by its decision in the instant case. Therefore, he urges the law was not "clearly established" prior to the Oklahoma Supreme Court's decision in April of this year. In so arguing, he asked the Oklahoma Supreme Court and now asks this Court to distinguish long-standing precedent of the Tenth Circuit Court of Appeals from the facts of this case on only minute and immaterial details. The Oklahoma Supreme Court rejected this attempt and this Court should as well.

A. In 1998, the Tenth Circuit Determined That Under Oklahoma Law, a Police Lieutenant Held a Protected Interest In His Rank as Lieutenant, Entitling Him to Due Process.

Petitioner argues *Hennigh v. City of Shawnee*, 155 F.3d 1249 (10th Cir. 1998), is distinguishable from this case, and therefore, his complete disregard of *Hennigh's* express holding was objectively reasonable and entitles him to qualified immunity. But *Hennigh* is not materially distinguishable from this case.

Mr. Hennigh was a lieutenant in the municipal police force of Shawnee, Oklahoma. As such, his employment was subject to a collective bargaining agreement negotiated pursuant to the Oklahoma Fire and Police Arbitration Act, 11 O.S. § 51-01 *et seq. Hennigh*, 155 F.3d at 1252. Emphasizing (1) the collective bargaining agreement's restriction of adverse personnel decisions unless "cause shown" is found and (2) the fact that the collective bargaining agreement was contracted pursuant to Oklahoma law, the Tenth Circuit wrote:

> Based on our prior holdings interpreting Oklahoma law and the decisions of the Oklahoma courts that matters concerning the FPAA are not of purely local concern, we hold that Plaintiff had a legitimate property interest in his rank. This property interest was created by state law in the form of the CBA, contracted pursuant to state legislation. The CBA gave Plaintiff a legitimate expectation of continued employment as a lieutenant unless the City found "for cause."

Hennigh, 155 F.3d at 1255. Furthermore, *Hennigh* was not even the first time the Tenth Circuit had considered an issue of adverse action absent a required determination of cause. In *Hennigh* (155 F.3d at 1253), the Tenth Circuit acknowledged its holding as far back as 1991, when in *Campbell v. Mercer*, 926 F.2d 990, 993 (10th Cir. 1991), the appellate court held that when a statute or regulation restricts discharge to circumstances of "just cause," an employee has a protected interest in that employment.

In the case now before this Court, Respondents were Sergeants in the municipal police force of Edmond, Oklahoma. As such, their employment was subject to a collective bargaining agreement negotiated pursuant to the Oklahoma Fire and Police Arbitration Act, 11 O.S. § 51-01

et seq. The relevant terms of the *Hennigh* CBA are virtually identical to the relevant terms of the CBA at issue in this case. The Oklahoma Supreme Court conclusively determined that: "under the terms of the CBA itself, which incorporates Oklahoma's FPAA, an employers' discretion to demote employees is restricted to demotions for cause." (Appendix A at pp. 10a-12a).

Petitioner urges this Court to ignore *Hennigh* as "clearly established" precedent on a single basis, to wit: the demotion in *Hennigh* was the result of discipline and the demotion in this case was, according to Petitioner, not disciplinary in nature. (Pet. at p. 21-22). This argument is without merit for several reasons. First, the CBA in this case prohibited both discipline and demotions, absent "for cause" shown. (Appendix A at p. 11a). *Hennigh* clearly states that when an employment action is by law limited to circumstances that reflect "cause shown," a person has a protected interest. Therefore, under the clear dictate of *Hennigh*, Respondents in this case had a protected interest against both discipline and demotion (whatever the impetus of the demotion may have been). The distinction urged by Petitioner is a matter of semantics, not substance.

Next, Petitioner continues to misrepresent the nature of the act that resulted in the deprivation of Respondents' right to due process. Petitioner writes the deprivation of due process was the "retesting of officers after the first test proved nugatory" and characterizes his conduct as a "non-disciplinary and involuntary implementation of the arbitrator's order." (Pet. at p. 22). Again, it is a matter of undisputed fact that Respondents were demoted. The demotion was the constitutional violation, not the forced participation in a second assessment center. It is also a matter of undisputed fact the arbitration order in question

did not (1) mention Respondents by name; (2) order Respondents must be demoted; or (3) determine Respondents' promotions were invalid. (Appendix A at p. 5a). In short, therefore, Petitioner was not implementing a required dictate of the arbitrator's award when he demoted Respondents. Instead, he was making a discretionary decision that, in his opinion, the arbitrator's award permitted him to demote Respondents, regardless of their well-settled constitutional rights. In this regard, this dispute is no different than the one at issue in *Hennigh*, in which the defendants therein determined that despite the lieutenant's successful defense of disciplinary action under the collective bargaining agreement, the city and police chief were nonetheless permitted to impose a demotion under some other basis, namely the city's charter. *Hennigh*, 155 F.3d at 1254. Returning to this case then, Petitioner is arguing that even though Respondents had a right to due process prior to their demotions, the action he took (along with the City) was nonetheless permitted for some other reason, to wit: the arbitration order. However, the *Hennigh* court rejected attempts to justify the defendants' actions therein based on something other than the CBA at issue in that case, and this Court should do the same.

There is nothing in *Hennigh* that permits the actions taken by Petitioner in this case. In fact, to the contrary, *Hennigh* makes clear that law enforcement officers in Oklahoma who serve pursuant to a CBA negotiated under state law and that prohibits adverse actions absent "cause" are entitled to due process protection in their particular ranks. *Hennigh* also rejects the principal argument advanced by Petitioner, namely that violations of due process are lawful if the act giving rise to the violations is permissible due to some other legal mandate or provision. The Oklahoma Supreme Court's determination that *Hennigh* is an example of clearly established law

serving as fair warning that Respondents' demotions were unlawful is correct and the attempts by Petitioner to minimize the case's significance are unavailing.

B. Also In 1998, the Tenth Circuit Determined That the Collective Bargaining Agreement Between the City Of Edmond and the Edmond Police Officer's Union, Gave Rise to an Edmond Detective's Protected Property Interest in His Continued Employment Because the CBA Prohibited Discipline Without Cause. In So Doing, It Held that the City Of Edmond and the Edmond Police Chief Violated the Detective's Right to Due Process.

In 1998, the Tenth Circuit considered a challenge by (then) Detective Dennis Dill to the police department and the (then) police chief's reassignment of Dill to the patrol division and change of days off. *Dill v. The City of Edmond, Oklahoma,* 155 F.3d 1193, 1202. The detective argued that his transfer and reassignment of days off were retaliatory – disciplinary in nature – and violated both his First Amendment and due process rights. *Id.* Ultimately, allowing a bench verdict in favor of the detective for violations of due process, the Tenth Circuit determined that because the CBA between the City of Edmond and the fraternal order of police provided that management could only "discipline, demote and discharge employees 'for cause,'" the detective "had a protected property interest in not being disciplined without cause." *Id.* at 1206.

The suggestions that *Dill v. The City of Edmond* did not place Petitioner on fair warning that his demotion of Respondents was unlawful and that the case has no common features with this dispute is simply incredible.

The City of Edmond and Petitioner's predecessor – the Chief of Police for the City of Edmond's police department – were actual parties to the case. The *Dill* dispute involved a collective bargaining agreement virtually identical to the one at issue in this case and negotiated between the same parties. The ultimate determination by trial court and affirmed by the Tenth Circuit was that because the City of Edmond CBA prevented discipline without cause, the City of Edmond and Chief of Police could not discipline a police officer without cause and without due process. The trial court's verdict for procedural due process violations against the City of Edmond was affirmed. *Id.* at 1193, 1206, 1208-09 and 1212.[2]

The same provision of the Edmond CBA at issue in *Dill* is also at issue in this case and the provision only allows demotions "for cause." It is simply beyond belief – and Petitioner has never even attempted to argue – that he or a reasonable person in his position would not have actual knowledge of the Tenth Circuit's decision in *Dill*. In fact, the Oklahoma Supreme Court determined as a matter of given fact for purposes of this appeal that both the City and Petitioner had actual knowledge of the Tenth Circuit's holding in *Dill*. (Appendix A at p. 18a).

The Tenth Circuit decided *Hennigh* and *Dill* in 1998 and within two weeks of one another. In 2000, no objectively reasonable person serving as a municipal Chief of Police in Oklahoma, much less the City of Edmond, could conclude that an officer employed under a collective

[2] The police chief in *Dill* was entitled to qualified immunity because the unlawful transfer/discipline in question occurred two years prior to any authoritative case law establishing a property interest in one's retained position. *Id.* at 1212.

bargaining agreement negotiated and entered into pursuant to Oklahoma state law, that limits demotions to "for cause" determinations was not entitled to due process protection of the officer's property interest in his/her rank.

C. Petitioner Urges A Far Too Narrow Interpretation of the "Contours of the Right" Requirement Established in *Anderson v. Creighton.*

Petitioner never expressly argues that he didn't know Respondents were entitled to due process. Instead, repeatedly quoting language in this Court's decision of *Anderson v. Creighton*, 483 U.S. 635 (1987), he argues that the law of due process wasn't sufficiently clear as it related to other established law. In so doing, Respondent emphasizes *Anderson's* directive that in order for qualified immunity to be denied, the right cannot be merely generally established. Rather, the right must have been:

> "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official is protected by qualified immunity unless the very action in question has previously been held unlawful, (citations omitted); but it is to say that in light of preexisting law the unlawfulness must be apparent.

Anderson, 483 U.S. at 641. In essence, what Petitioner urges this Court to conclude is that because prior to this dispute, no court had ever expressly determined that one could have a property interest in rank "where the rank was derived from a promotional list which had been

determined to be void," the law was not "clearly established" at the time Petitioner demoted Respondents. (Pet. at p. 15).

However, such a conclusion is only possible after far too narrow of a consideration of the right at issue here: Respondents' property interest in their ranks as Sergeants. To conclude that the law was not "clearly established" simply because neither the *Dill* nor *Hennigh* plaintiffs achieved their respective positions through a later-declared void selection process is to fall into the trap of evaluating "the very action in question" – a demotion allegedly attributed to an arbitration declaration that an eligibility list was void.

The identical circumstances do not have to have been previously litigated, but only the unlawfulness of the conduct must have been objectively reasonably apparent. *Id.* In this case, pre-existing law established police officers like Respondents have protected interests in their ranks; demotions of officers without cause when the collective bargaining agreement forbids it is a violation of due process; and violations of due process cannot be otherwise justified by the existence of other legal bases for the action in question. In April 2000, these previously established principles placed reasonable officers and Petitioner on notice that demotions of police Sergeants without due process were unlawful.

If this Court was to accept Petitioner's argument that the law was not "clearly established" because courts prior to April 2000 had not considered the demotion of an officer who was promoted pursuant to a "void" eligibility list (a list voided only after it had expired), the result would be that no right would ever be "clearly established." Defendants in all cases would set upon a course of

distinguishing every case precedent on the same types of minute details Petitioner urges in this case – turning qualified immunity into a virtually unassailable shield that would effectively bar all claims of personal liability – something this Court never intended. Officers' subjective beliefs would always be relevant and there would never be a right sufficiently established so as to defeat a claim of qualified immunity. Persons seeking to impose individual liability on officers would be forced to prove that the exact action in question had previously been declared unlawful. Such a legal landscape and course of litigation is precisely what this Court sought to avoid when it decided *Anderson* (as originally acknowledged by the *Mitchell* Court) and reiterated that qualified immunity does not require the "very action in question" be determined unlawful in order to meet the "clearly established" requirement.

III. Binding Arbitration Is Not a Legal Justification for Denying Respondents Due Process.

The Petitioner's focus on the affect of an arbitrator's ruling under Oklahoma law is irrelevant to the determination of whether the Respondents' due process rights were "clearly established" for purposes of Petitioner's liability. The issues to be determined when evaluating the defense of qualified immunity are whether the alleged actions are contravened by currently applicable law and whether that currently applicable law was clearly established at the time the officer acted. *Harlow,* 457 U.S. at 819.

Petitioner does not dispute that the Respondents had a property interest in their ranks and that they were entitled to due process. This was conclusively determined by a unanimous Oklahoma Supreme Court (the three Justices dissented only on the issues of appellate jurisdiction and qualified immunity). Instead, Petitioner argues

that Oklahoma Supreme Court precedent regarding binding arbitration, and in particular the intermediate appellate court's decision and subsequent denial of certiorari by the Oklahoma Supreme Court in *FOP and Neal v. The City of Edmond*, Oklahoma Court of Civil Appeals case number 93,932, imposed a legal burden on Respondent that conflicted with the burdens imposed upon him by *Hennigh* and *Dill*. However, Petitioner's arguments regarding the significance of *Neal* and other Oklahoma decisions related to arbitration are unpersuasive, for a number of reasons.

First, when evaluating a qualified immunity defense, the threshold question is whether the alleged right violated – in this case Respondents' rights to due process – was clearly established at the time the official acted. *Harlow*, 457 U.S. at 819. The inquiry does not require a determination of what other existing laws may be implicated and whether those laws are "clearly established." In this case, Respondents' rights to due process were conclusively established as of April of 2000. *Hennigh* and *Dill* had been law for almost two years.

Instead and next, Petitioner urges this Court to conclude that his disregard of Respondents' constitutionally protected rights is excused by other legal mandates – namely that arbitration awards are generally binding. But *Neal* and the other cases setting forth the binding nature of arbitration are not relevant to Respondents' rights. This case, unlike *Neal* and the other cases cited by Respondent, does not involve the refusal of the City and Petitioner to abide by a binding arbitration decision. Instead, this case involves the decision by the City and Petitioner to demote Respondents without due process, an action they allege was implicitly compelled by the arbitrator's award.

But neither the facts nor the law support any reasonable conclusion that Respondents' demotions were mandated by the arbitration award at issue. The arbitration award did not void Respondents' promotions; it did not order Respondents be demoted; it did not even mention Respondents by name. However, had the arbitration award expressly done so as Petitioner repeatedly urges it did by implication, under existing law that aspect of the arbitrator's award would have been subject to appeal and reversal because it would have exceeded the arbitrator's authority and the scope of the controversy before him.

An arbitrator's function is to enforce the agreement in question and not to protect constitutional rights. *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 290-91 (1984). If there is a conflict between the requirements of the contract and the constitutional rights of the parties, the arbitrator must enforce the contract. *Id.* Even the individual who loses his or her grievance pursuant to the arbitration is not precluded from bringing suit to enforce his or her constitutionally and statutorily protected rights. *Id.* at 292.

In this case, Respondents were not allowed to participate in the arbitration that Petitioner insists mandated their demotions. (Appendix A at p. 20a, n. 12). Even had they been, under *McDonald*, they still would have the opportunity to challenge the constitutionality of the arbitrator's decision to the extent it allegedly required their demotions. Certainly, if a party to an arbitration is not foreclosed from seeking redress for violations of his constitutional rights, third parties whose rights were violated by an arbitration award are not without a forum for redress.

More significantly, an arbitrator cannot resolve disputes of constitutional rights. Therefore, even if the arbitration award did require Respondents' demotions, that aspect of the award would be appealable and subject to reversal. Even under the authority upon which Petitioner allegedly relied, arbitration orders that exceed the scope of an arbitrator's authority are subject to judicial review. *See, e.g., City of Bethany v. Public Employees Relations Bd. of State of Okl.,* 904 P.2d 604, 614, n. 33 (Okla. 1995) (citations omitted). Since an arbitrator has no authority to adjudicate constitutional rights, had the arbitration order compelled Respondents' demotions, such an action would have exceeded the arbitrator's authority and would have been unlawful. *McDonald, supra.* Considering this Court's 1984 decision in *McDonald* and the long established exception to the rule of binding arbitration, Petitioner's alleged belief that the rule of binding arbitration compelled his violation of Respondents' constitutionally protected rights to due process was both incorrect and unreasonable.

Additionally, Petitioner's repeated assertions that his own experiences in the *Neal* litigation compelled his compliance with the arbitrator's allegedly implied mandate Respondents be demoted are disingenuous. Petitioner states that "his experience with the judicial responses to arbitration also informed his actions." (Pet. at p. 6). Petitioner then goes on to explain how his attempt to challenge an arbitrated decision involving Officer Neal was rejected by the Oklahoma Court of Civil Appeals. Petitioner again emphasizes the purported significance of these events to his own decision-making process when he writes: "He received from both the trial court and the intermediate appellate court boiler plate reminders of the sanctity of arbitration. The Oklahoma Supreme Court

refused to grant certiorari. This disabused him of any notion that he had a choice in this matter." (Pet. at p. 28).

The decisions of the Oklahoma appellate courts in *Neal* could not possibly have influenced Petitioner's own subjective belief in the propriety of his actions, nor could they have formed an objectively reasonable basis for anyone to conclude the demotions were lawful. The reason is simple: the Oklahoma appellate court's decisions in the *Neal* litigation occurred after Respondent and the City had already demoted Respondents.

Respondents were demoted effective April 26, 2000. (Appendix A at p. 5a). The unpublished opinion of the Oklahoma Court of Civil Appeals in the *Neal* case and upon which substantial emphasis is placed throughout Respondent's arguments to this Court, was not handed down until June 16, 2000, roughly two months after Petitioner demoted Respondents. (Appendix A at pp. 35a and 41a). The Oklahoma Supreme Court denied certiorari on October 17, 2000 another four months later. (Appendix A at p. 35a).[3] Only the trial court's decision in the *Neal* litigation occurred prior to Petitioner's demotions of the Respondents. Therefore, Justice Winchester in dissent below (Appendix A at p. 41a), and Petitioner's arguments to this Court that he actually and objectively reasonably relied on the June 16, 2000 unpublished opinion by the Oklahoma Court of Civil Appeals in the *Neal* litigation, are simply incorrect.

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[3] This information is also a matter of public record. Oklahoma Supreme Court dockets are available to the public at www.oscn.net. The appellate court docket number for *Neal* is case number AP-SD-93932.

In essence, Petitioner argues that an unpublished Oklahoma intermediate appellate court decision in another case, not handed down until months after the decision to demote Respondents, trumped his and the City's obligations to afford Respondents due process. In so doing, he argues that settled law required him to enforce the arbitration award. But, he ignores the undisputed facts that the arbitration award did not even mention Respondents, did not void or invalidate their promotions and did not order their demotions. He also suggests the dictates of the Oklahoma Supreme Court regarding binding arbitration supercede the long-standing case law establishing Respondents have constitutionally protected rights in their ranks. Finally, he also ignores long-standing precedent of this Court that even had the arbitrator adjudicated Respondents' constitutional rights, in so doing the arbitrator would have exceeded his authority under the arbitration agreement and federal law. *McDonald, supra.*

Petitioner insists his alleged subjective belief in the lawfulness of his actions was objectively reasonable. However, to accept Petitioner's argument that he reasonably believed the arbitration award lawfully required Respondents be demoted, one must:

1. completely disregard 1984 Supreme Court precedent;

2. completely disregard 1998 Tenth Circuit precedent;

3. adopt, at best, a contrived interpretation of the arbitration award itself;

4. adopt only a portion of Oklahoma Supreme Court precedent regarding the binding nature of arbitration while ignoring the same

precedent's pronouncement of exceptions to that rule when the arbitrator exceeds the scope of his or her authority; and

5. conclude that even though Respondents were not parties to the arbitration and did not commit misconduct justifying a "for cause" demotion, their demotions were nonetheless lawful.

Such a construction of the facts and controlling law is not objectively reasonable. The Oklahoma Supreme Court was correct in its determination that the law was "clearly established" sufficient to place Petitioner on notice that his actions were unlawful. There is no reason for this Court to grant certiorari.

IV. Should This Court Grant Certiorari, It Should Do So Only To Correct the Oklahoma Supreme Court's Determination that an Issue Of Fact Precludes the Finding that Petitioner Is Not Entitled To Qualified Immunity.

Pursuant to SUP. CT. R. 15, Respondents alternatively submit that should this Court choose to grant certiorari, it should do so only for the limited purpose of correcting the Oklahoma Supreme Court's determination that an issue of fact remains precluding the determination of whether Petitioner is entitled to qualified immunity. The Oklahoma Supreme Court resolved all facts and issues of law necessary to resolve the issue of qualified immunity – and those correct determinations compel the conclusion that Petitioner is not immune from suit.

The task for any court in determining a defendant's entitlement to qualified immunity is straightforward; it has been detailed in many opinions of this Court and in

the briefs submitted by the parties. The critical inquiry is whether the officer's conduct violated clearly established law at the time. Though this is a legal determination at its core, it necessarily involves some determination of the facts prior to resolution of the legal issue. *Harlow*, 472 U.S. at 528.

To be sure, there are some circumstances in which a factual dispute precludes summary judgment in favor a defendant seeking qualified immunity. *See e.g., Johnson,* 515 U.S. at 319-320. However, like *Johnson,* those cases usually occur when the issue of qualified immunity has been resolved adversely to the defendant and what actually remains is a disputed fact as to the liability of the defendant who is not immune from suit. In *Johnson,* three police officers sought immediate denial of their motion for summary judgment in an excessive force case. Their principal complaint was because the evidence was insufficient to establish they participated in the alleged beating of a prisoner, they were entitled to summary judgment and the denial was immediately appealable because they asserted qualified immunity defenses. *Id.* at 308. In deciding which types of summary judgment denials are subject to immediate appeal, this Court reemphasized the distinction between issues related to the defense of qualified immunity and those related to the ultimate determination of liability. *Id.* at 2157 ("... *Mitchell* rested upon the view that 'a claim of immunity is conceptually distinct from the merits of the plaintiff's claim.'") (citations omitted).

However, like *Johnson*, this case is not a case in which factual disputes remain with regard to the question of whether Petitioner is entitled to qualified immunity. The Oklahoma Supreme Court determined, correctly, that the demotions by Petitioner of Respondents violated their due

process rights because they had a protected interest in their ranks as Sergeants. (Appendix A at pp. 12a and 14a). Again, on this point the Oklahoma Supreme Court was unanimous and Petitioner does not challenge this determination. The Oklahoma Supreme Court also correctly determined that the law establishing Respondents' property interests and the law of due process was clearly established in April of 2000. Therefore, under the well-settled dictates of this Court, Petitioner is not entitled to qualified immunity. *Anderson, supra; Harlow,* 457 U.S. 800 ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by that conduct may have a cause of action.").

The Oklahoma Supreme Court did identify a factual dispute yet to be determined – whether there were other lawful actions Petitioner could have taken to comply with the arbitration award that would not have resulted in Respondents' demotions. (Appendix A at p. 18a). However, the Oklahoma Supreme Court's conclusion with regard to the legal significance of this factual dispute is incorrect. The factual dispute does not relate to qualified immunity; if it relates to anything at all, the dispute only goes to the question of Petitioner's liability for what has already been determined to be a violation of Respondents' due process rights.[4]

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[4] As will be presented on remand, there are alternatives the City and Petitioner could have chosen that would have been in compliance with the CBA, the arbitrator's award, Oklahoma law and would not have resulted in a violation of Respondents' rights to due process.

The mistake is apparent in the Oklahoma Supreme Court's summary of its own conclusion regarding Petitioner's liability. It wrote:

> [Respondents] sustained their burden of naming the clearly established right, a property interest in their employment ***and*** rank, through clearly established law at the time, i.e., the Tenth Circuit Court of Appeals' cases, *Hennigh* and *Dill.* (Appendix A at pp. 17a-18a) (emphasis in original).

At this point, the facts and legal issues relative to Petitioner's claimed immunity should have been resolved. The demotions were violations of Respondents' clearly established rights to due process. Therefore, Petitioner is not entitled to qualified immunity. However, the Oklahoma Supreme Court, acknowledging a disputed defense asserted by Petitioner, went on to write:

> [Petitioner] responds with the claim that he had no choice except to follow the Arbitrator's ruling. This position raises material factual issues: did [Petitioner] have to demote [Respondents] in order to comply with the arbitration award, thereby depriving them of their property interest and due process rights, or was there an alternative method of compliance which also complied with the law and the CBA? (Appendix A at p. 18a).

Respondents submit that this factual dispute is irrelevant to all the issues in this case, including the question of Petitioner's liability. However, if at all relevant this factual dispute goes to Petitioner's ultimate liability, not his immunity from suit. Nonetheless, in the very next sentence, the Oklahoma Supreme Court writes:

> Did [Petitioner] disregard clearly established law at the time? (Appendix A at p. 18a).

Thus, it is apparent that the Oklahoma Supreme Court believes the two questions it has presented are but two sides of the same coin – they are not. The first question is yet unresolved by the record evidence. The second question, however, was resolved by the Oklahoma Supreme Court itself: Petitioner demoted Respondents; the demotions deprived Respondents of their property interests in their employment and rank and due process, and the law establishing such was clearly established as of April 2000.

Finally, as alluded to above, the record is clear that Respondents also moved for summary judgment on their due process claims in the trial court below. Believing the denial of summary judgment to a party seeking affirmative relief and damages is not an immediately appealable order, Respondents only appealed the granting of summary judgment to the City and Petitioner to the Oklahoma Supreme Court. At issue in this Court is Petitioner's entitlement to qualified immunity. By advancing the argument that the unresolved factual dispute identified by the Oklahoma Supreme Court – the existence of other lawful alternatives to demoting Respondents – is not relevant to the determination of qualified immunity, Respondents are not conceding that the factual dispute is actually relevant to the ultimate question of liability. In fact, Respondents believe that the existence of alternatives is not relevant to the determination of whether they are entitled to recover damages for the violations of their rights to due process from either Petitioner or the City of Edmond.

Instead, Respondents submit that should this Court grant certiorari, it should do so for the limited purpose of correcting the Oklahoma Supreme Court's determination

that the unresolved question of fact is relevant to the determination of Petitioner's qualified immunity. It is not. To the contrary, under the facts decided by the Oklahoma Supreme Court it's clear that Petitioner is not entitled to qualified immunity.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

DENNIS COCHRAN, Individually and in his Capacity as the Chief of Police of the City of Edmond, Oklahoma,

Petitioner,

v.

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES, and JAMES DALLAS TELL, III,

Respondents.

On Petition For Writ of Certiorari to the Supreme Court of Oklahoma

PETITIONER'S REPLY BRIEF

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For his reply to Respondent's Brief in Opposition to the petition for writ of certiorari in this case, Petitioner Dennis Cochran submits the following:

PROPOSITION I:

RESPONDENTS' EMPHASIS ON THE "CLEARLY ESTABLISHED" NATURE OF RIGHTS PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT DIVERTS FROM THE ACTUAL ISSUE OF A MUNICIPAL DECISION MAKERS' GRUDGING ACQUIESCENCE TO AN ARBITRATION DECISION ENTERED PURSUANT TO THE TERMS OF THAT AGREEMENT. ONLY THE LATTER COMES BEFORE THIS COURT FOR REVIEW.

Both the Oklahoma Supreme Court and the Respondents hammer away at the immunity right of Dennis Cochran by drawing attention to the Tenth Circuit's opinions in *Dill v. City of Edmond*, 155 F.3d 1193 (1998) and *Hennigh v. City of Shawnee*, 155 F.3d 1249 (1998). They accurately portray these cases as supporting the proposition that clearly established law allows property interests to spring from Collective Bargaining Agreements. Neither Dennis Cochran nor the City of Edmond have ever disputed this now fundamental legal principle. That, however, is not what brings Dennis Cochran before this Court.

Chief Cochran contends that, until so advised by the majority of the Oklahoma Supreme Court, he had no way of knowing that the property right claimed by Respondents had vested by operation of clearly established law during the pendency of a challenge to the validity of the promotion process - a challenge whose legal genesis also arose out of the Collective Bargaining Agreement. If a grievant could not effect the outcome of a promotion process he claimed tainted, then the grievance process under the Collective Bargaining Agreement become empty words and promises incapable of being kept or enforced. If, on the other hand, the grievance process had real teeth, then the results of the tainted process could not establish vested rights.

The arguments and depositions before the court below establish that Dennis Cochran occupied the role of totally

dispassionate observer of the grievance process which culminated in the vacation of the promotion examination results by which Respondents occupied their respective offices as sergeants with the Edmond Police Department. He not only maintained all along that the right persons were promoted; he actually bucked the union and stood up for the right of the Respondents to occupy their posts during the pendency of the grievance. Left up to him, these men would never have left that position. Bound by law, and the arbitrators' ruling, however, he bowed to the inevitable.

Stated simply, the "general rule applied by both this Court and the Tenth is that a qualified immunity defense succeeds unless a plaintiff alleges that defendant violated that plaintiff's clearly established rights." *Roska v. Peterson*, 304 F.3d 982, 1000 (10th Cir. 2002). In practice, this means that whether a governmental official performing discretionary functions is entitled to qualified immunity turns on the "objective legal reasonableness" of the official's actions in light of the clearly established law at the time the actions were taken. *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

This Court, in *Hope v. Pelzer*, 122 S.Ct. 2508, 2515 (2002), recently described "clearly established law" as follows:

> As we have explained, qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. at 206. . . . For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [*v. Forsyth*, 472 U.S. 511,] 535, n. 12 . . .; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S.

635, 640 . . . (1987).

Chief Cochran does not quote this Court's own opinions idly or in the belief that it needs reminders as to the contours of the qualified immunity defense which this Court itself established and continues to embrace. Rather, he does so to point out that the circumstances of this case highlight the need, in light of the foundation which this Court has laid, to grant certiorari in order to draw that embrace more protectively and securely around its jurisprudential offspring lest it become lost in a crowded field in which each State may place its own limiting or expansive mark upon the defense.

The precedents of this Court, and of the various circuits and districts, establish that qualified immunity is the norm. "[The plaintiff's] burden is not easily discharged: `That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities.'" *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996).

Therefore, even assuming Respondents' case as developed thus far sufficient to state a Constitutional violation, the next question in the qualified immunity inquiry is "whether it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 201-02. Qualified immunity turns on whether an officer could, or could not, have held an objectively reasonable belief in the legality of the challenged conduct. See, e.g., *Wilson*, 526 U.S. at 614: "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the `objective legal reasonableness' of the action, assessed in light of the legal rules that were `clearly established' at the time it was taken." (Citations omitted.) "Stated another way, qualified immunity shields a defendant from suit if he or she could have reasonably believed his or her conduct to be lawful `in light of clearly established law and the information [that the defendant] possessed. . . . The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law."'" *Smithson v. Aldrich*, 235 F.3d 1058, 1061 (8th Cir.

2000). See also *Figg v. Schroeder*, 312 F.3d 625, 636 (4th Cir. 2002): "Under the doctrine of qualified immunity, `officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'" (Citation omitted.)

At this point in their analysis, the reasoning of the majority of the Oklahoma Supreme Court and the Respondents breaks down in light of the way this Court has guided the evolution of qualified immunity to date. A defendant always enjoys the benefit of a presumption in favor of his good faith immunity. Allowing a generically accurate statement of the law ("collective bargaining agreements as sources of property interests") to overshadow the circumstantial and objective reasonableness of an official's action at the time the challenged action occurred becomes hazardous to the rule. As held in *Anderson:*

> The operation of this [clearly identified] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

483 U.S. at 639. See also *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) ("As with the example of the Due Process Clause cited in *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, the

fact that the Fourth Amendment embodies "well-established" principles will not defeat a claim of qualified immunity. Otherwise, the doctrine is rendered a mere rule of pleading.")

In addition to defending the vitality of *Anderson* and its progeny, the grant of certiorari in this case would further two other important federal interests:

First, to allow evaluation of qualified immunity in the manner urged by Respondents and applied by the majority of the Oklahoma Supreme Court gives primacy to a rule based on hindsight - a basis upon which subjective exceptions might eviscerate the rule. Even if, in hindsight, the conduct of Chief Cochran violated the Fourteenth Amendment, Respondents' rights in this context were certainly not clearly established by precedent or by a generally applicable principle whose *specific application* to this controversy was *clearly foreshadowed* by direct authority. Never before has this Court, the Oklahoma Supreme Court, or the Tenth Circuit attempted to determine the status of a right as vested under a Collective Bargaining Agreement while under challenge instituted under the grievance provisions of that same Agreement. Never has the potential conflict found harmonizing interpretation in any jurisdiction in which Chief Cochran served. The right must be stated with sufficient particularity so that a "`reasonable officer would understand that what he is doing violates that right'" and the right must have been "clearly established at the time of the defendants' alleged improper actions, and . . . not . . . through the use of hindsight." *Souza v. Pina*, 53 F.3d 423, 425 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). A court cannot extract a clearly established right from a somewhat confusing body of caselaw through the use of hindsight, or "permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis." *Martinez-Rodriguez v. Colon-Pizarro*, 54 F.3d 980, 989 (1st Cir. 1995).

Chief Cochran can, by no means, be cast in the role of malefactor in this case. As noted, he championed these Respondents' rights to remain in their post during the pendency of the grievance and consistently maintained they were the right men for the post. However, as the hapless

decision maker he found ultimately found himself between a rock and a hard place. Regardless of whether he decided to defy the arbitration award or comply, some faction within the department or union would rise against it. This situation was unique in his experience. While personally favorably disposed to Respondents, he did not need to engage in futile litigation prior to abiding by the Collective Bargaining Agreement and honoring the arbitration. In doing so he erred, if at all, on the side of orderly process and settled expectations as to the binding nature of the arbitrations mandated by the Collective Bargaining Agreement. As the occupant of a position symbolizing both the primacy of law and the necessity of order, it constituted a rational choice. Under the contours of qualified immunity established by this Court and impressed upon the opinions of other federal tribunals, no court may second-guess him into exposure to personal liability. In defense of this essential tenet of federal jurisprudence, this Court should grant certiorari to rectify the erroneous result and ruling of the Oklahoma Supreme Court.

As a second point, nothing in the opinion of the Oklahoma Supreme Court establishes that it ever considered the "clearly established" issue from the perspective of Chief Cochran as a police chief experienced in the administration of law enforcement but untrained in the subtleties of law. To charge the ordinarily prudent police officer with the ability and/or obligation to engage in a prospective and lawyer-like analysis of a Collective Bargaining Agreement, together with satellite issues of Constitutional and property law, and to impose upon him the duty to determine the potential construction and application of potentially conflicting portions of that agreement (a prerequisite to the "clearly established" and "objectively reasonable" analysis) is unrealistic and, indeed, inappropriate. In *Saucier*, this Court stated explicitly that "[t]his inquiry ["clearly established], it is *vital* to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." Thus courts must consider the context from the defendant's perspective.

In sum, neither Respondent nor the Oklahoma Supreme Court reconcile the latter's decision with this

Court's repeated recognition that qualified immunity cannot be denied merely because the conduct is later held to be unlawful. Quite the contrary , this Court has explained, immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was lawful at the time the defendant acted. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (emphasis added). See also ibid. ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"); *Wilson v. Layne*, 526 U.S. at 614-615 ("'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'") (quoting *Anderson* , 483 U.S. at 639-640); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Malley*, 475 U.S. at 343, 341)).

A court addressing a qualified immunity claim on summary judgment must, for purposes of the motion, resolve all material factual disputes in favor of the plaintiff and "look[] to the evidence before it (in the light most favorable to the plaintiff)." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). The court then must ask whether, under those circumstances, any reasonable officer could have thought the conduct in question lawful. If the answer is "yes," immunity must be granted. See *Malley*, 475 U.S. at 341 ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"). If instead, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was lawful, immunity should be denied. *Id.*

Respondents' arguments notwithstanding, grant of certiorari in this case would serve several important federal goals:

1. It would prevent lower courts from elevating generic legal truisms to the level of "clearly established law" in the unique context of specific cases;

2. It would restore circumstantial and temporal objectivity to the qualified immunity analysis;

3. It would prevent the nullification of qualified immunity by state-wrought exceptions likely to .swallow the rule.

Therefore, Chief Cochran renews his request that this Court grant his Petition.

PROPOSITION II:

RESPONDENTS MISCAST AND MISCONSTRUE THE SIGNIFICANCE OF *NEAL*

Respondents call this Court's attention to Oklahoma court rules which prohibit citation to unpublished appellate opinions. Respondents also point out that the decision to re-test them in the wake of the arbitrator's decision predates the appellate disposition of the Adrian Neal case. In this manner, they seek to dilute Chief Cochran's (and indeed the City of Edmond's) experience with the arbitration process leading them to bow to the inevitability of enforcement of the arbitration award. In fact, they miss the point of the *Neal* reference.

Chief Cochran neither cites *Neal* as legal authority for any proposition raised in his Petition for Certiorari nor does he submit it to persuade this Court that his action in abiding by the arbitration opinion in the manner he did has received the sanction of "clearly established law." As exhaustively discussed in the preceding proposition the Oklahoma Supreme Court wrote the opinion at issue here upon a true *tabula raza* in terms of the situation confronting Chief Cochran. The whole point of his position as to qualified immunity is that *no clearly established law existed.* Chief Cochran's experience with Adrian Neal does not provide the genesis of his fatalism regarding judicial challenge to the arbitration decision despite his personal belief that the arbitrators erred. Rather, *Neal* represented a symptom of the legal double-bind in which the law placed Chief Cochran and any reasonable, similarly situated official.

Neal, like the whole of Oklahoma's public arbitration jurisprudence, constitutes not precedent but a basis for belief. The determination of whether a federal law "was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of

`legal facts.'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Medina v. Cram*, 252 F.3d 1124, 1127-28 (10th Cir. 2001). A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." *Elder, supra.* If this be true for a court in order to assess the objective reasonableness and the lawfulness of an action in hindsight, should not the same standard apply to non-prescient lay public officials? A reviewing court has the benefit of *stare decisis* to assist it. For the layman, *stare decisis* equates with experience. Lay experience does not differentiate between mandatory and persuasive authority. It does not distinguish published from unpublished decisions. The layman merely knows what has happened to him in much the same fashion as root source of experience provides truth to the accuracy of the platitude "once burned; twice cautious."

In Oklahoma, the fundamental purpose of arbitration is to preclude court intervention into the merits of a dispute when arbitration has been provided for contractually. *Voss v. City of Oklahoma City,* 1980 OK 148, 618 P.2d 925, 927. The scope of judicial review of an arbitrator's decision was reiterated in *City of Yukon v. Int'l Assn of Firefighters, Local 2055*, 1990 OK 48, 792 P.2d 1176:"'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' this Court has no power to reverse his decision, even if we were convinced the decision was error." (quoting *United Paperworkers Int'l v. Misco*, 484 U.S. 29, 37 (1987)). This judicial philosophy constitutes the legal Pole Star by which those involved with public arbitration take their bearings.

To tighten the bind in which the law places someone in Chief Cochran's position, if the view of the Oklahoma Supreme Court in this case becomes the norm, we have the concept of presumed legal knowledge. As recently stated by the Oklahoma Supreme Court: "persons dealing with public officials are charged with notice of limitations upon the powers of the official." *State ex rel State Insurance Fund v. JOA, Inc.*, 2003 OK 82, 22, __ P.3d __. Secondly, "[i]t is well established in Oklahoma that every person is presumed to know the law." *Hefley v. Hefley*,1995 OK CIV APP 143, 14, 915 P.2d 389. These principles which apply to all persons in

Oklahoma, and which may apply more strongly in the case of a public official, create the box in which extant local law constructed in regard to his expectation of futility in resisting the arbitrator's order. His personal experience in having his efforts to resist summarily rebuffed in *Neal* drove in the final nail.

In *Elder*, this Court stated that "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.' *Harlow v. Fitzgerald,* 457 U.S., at 806." 510 U.S. at 515. Just as the Ninth Circuit decision scrutinized in *Elder*, the Oklahoma Supreme Court's qualified immunity analysis "does not aid this objective because its operation is unpredictable in advance of the district court's adjudication. Nor does the rule further the interests on the other side of the balance: deterring public officials' unlawful actions and compensating victims of such conduct." *Id.* at 516. In fact, the differing opinions of the trial judge and the dissenting justices below point out once more how unfair imposing liability on an after-fashioned rule of law becomes. It also points out how destructive such adjudications may become to the qualified immunity rule so carefully crafted by this Court to date. It can only serve to encourage the litigious to take their chances in filing actions against the public officials the qualified immunity rule came into being to spare.

CONCLUSION

For these reasons, and those set out in the original Petition, this Court should grant Chief Cochran's writ.

Respectfully submitted,

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